(1)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AURELIA DAVIS, as next friend of LASHONDA D.,
Petitioner,

v.

MONROE COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, which prohibits sex discrimination in federally funded education programs and activities, encompasses a cause of action for peer hostile environment sexual harassment.

2. Whether the legal principles regarding sexual harassment that have developed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, should be applied to analyze claims of sexual harassment under Title IX of the Education Amendments of 1972.

LIST OF PARTIES

The parties to the proceeding below were the Petitioner Aurelia Davis, as next friend of her daughter, LaShonda D., and the Respondents Monroe County Board of Education, Bill Querry, and Charles Dumas.

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Petitioner, Aurelia Davis, as next friend of LaShonda D., respectfully petitions for a writ of certiorari to review the *en banc* judgment of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on August 21, 1997.

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals is reported at 120 F.3d 130 (11th Cir. 1997) and is reproduced in the Appendix (App.) filed herewith. App. 1a. The opinion of the three-judge panel of the Court of Appeals is reported at 74 F.3d 1186 (11th Cir. 1996). App. 62a. The opinion of the district court in this case is reported at 862 F. Supp. 363 (M.D. Ga. 1994). App. 82a. The order vacating the three-judge panel decision

and granting the petition for rehearing *en banc* is reported at 91 F.3d 1418 (11th Cir. 1996). App. 91a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on August 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provision of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX"), is set forth below:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a).

STATEMENT OF THE CASE

A. Introduction and Factual Background

Petitioner Aurelia Davis brought this action against the Monroe County Board of Education ("Board") in 1994, challenging the Board's conduct in tolerating and condoning a pattern of severe and pervasive sexual harassment of her minor daughter, LaShonda D. Subject matter jurisdiction was invoked under 28 U.S.C. §§ 1331 and 1343(3).

The complaint alleged that LaShonda endured a five-month barrage of sexual harassment and abuse by fellow fifth-grader "G.F." while she was a student at Hubbard Elementary School in Monroe County. Specifically, starting in December 1992, G.F. repeatedly attempted to touch LaShonda's breasts and vaginal area, directed vulgar language toward her, and engaged in other inappropriate

sexual misconduct in the classrooms and hallways of their school. After each instance of sexual misconduct, either LaShonda, Mrs. Davis, or both would complain to the appropriate teachers. *See Complaint*, App. at 95a-96a.

In May 1993, after enduring five months of persistent sexual harassment and receiving no response from school officials to her requests for help, LaShonda told her mother that she "didn't know how much longer she could keep [G.F.] off her." App. at 96a-97a. Mrs. Davis contacted Principal Querry to determine what action would be taken to protect her daughter. Mr. Querry responded by saying he "guess[ed he would] have to threaten [G.F.] a little bit harder," and asking LaShonda "why she was the only one complaining." App. at 97a.

At no time during G.F.'s five-month campaign of sexual harassment targeting LaShonda did the Board or its employees respond in a manner designed to stop the misconduct. Neither the Board nor its employees ever suspended or otherwise disciplined G.F. App. at 97a. In March 1993, a teacher refused to allow LaShonda and other girls whom G.F. had sexually harassed to meet with Principal Querry, telling them "[i]f he wants you, he'll call you." App. at 96a. Another teacher required LaShonda to sit next to G.F. during her class, ignoring LaShonda's repeated request over the course of three months for a new seating assignment to avoid contact with G.F. App. at 97a. Throughout the course of harassment, the Board had no policy prohibiting the sexual harassment of students in its schools, nor did it provide any training to its employees instructing them on how to respond to incidents of sexual harassment of students. App. at 98a.

The sexual harassment LaShonda experienced seriously interfered with her ability to benefit from the education provided by the Board at Hubbard Elementary School. The constant sexual harassment by G.F. lessened her ability to concentrate and caused her grades, previously

all A's and B's, to suffer. App. at 97a. In addition, the harassment had a debilitating effect on her mental and emotional well-being, causing her to write a suicide note that her father found in April 1993. App. at 97a.

B. Proceedings Below

Mrs. Davis filed a complaint against the Board in the United States District Court for the Middle District of Georgia on May 4, 1994, alleging a violation of Title IX of the Education Amendments of 1972, seeking injunctive relief and compensatory damages.[1]

The district court dismissed Mrs. Davis' claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure on August 29, 1994. The district court concluded that the Board's failure to respond to the repeated complaints by Mrs. Davis and LaShonda did not violate Title IX because "[t]he sexually harassing behavior of a fellow fifth grader is not part of a school program or activity." *Davis v. Monroe County Bd. of Educ.*, 862 F. Supp. 363, 367 (M.D. Ga. 1994). App. at 88a. The district court found that because neither the Board nor its employees "had any role in the harassment," "any harm to LaShonda was not proximately caused by a federally-funded education provider." *Id.*

On February 14, 1996, a divided panel of the Eleventh Circuit Court of Appeals reversed the district court's decision, ruling that a school district that knowingly permits a hostile environment created by a student's sexual harassment may be liable for injunctive and compensatory relief under Title IX. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186 (11th Cir.), *vacated and reh'g granted*, 91 F.3d 1418 (11th Cir. 1996). App. at 62a. Relying on this Court's precedents regarding Title IX's construction and looking to well-settled principles governing sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the panel reasoned that Title IX affords students at least as much protection from sex discrimination in school as Title VII affords adults in the workplace.

[1] The complaint also alleged individual claims against Superintendent Charles Dumas and Principal Bill Querry, and additional claims against the Board for violation of LaShonda's constitutional rights and racial discrimination. However, only the Title IX claim against the Board is properly before this Court.

The Eleventh Circuit vacated the panel decision and granted the Board's petition for rehearing *en banc* on August 1, 1996. *Davis v. Monroe County Bd. of Educ.*, 91 F.3d 1418 (11th Cir. 1996). App. at 91a. On August 21, 1997, the Eleventh Circuit, sitting *en banc*, held that Title IX does not provide a cause of action for peer hostile environment sexual harassment. The court found that Congress neither intended nor provided sufficient notice for educational institutions to be held liable for this form of sex discrimination under Title IX. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997). App. at 1a. In addition, the court held that legal principles regarding sexual harassment that have developed under Title VII are not applicable to Title IX claims of sexual harassment. *Id.* at 1400 n.13. App. at 19a-20a.

Judge Rosemary Barkett, joined by Chief Judge Hatchett, and Senior Judges Henderson and Kravitch, dissented from the *en banc* ruling of the court, noting that the majority decision conflicts with decisions of this Court, other courts, and with Title IX's language and legislative history. The dissent faulted the majority's analysis as conflicting with this Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992): "[U]nder [the court's] narrow view, even the cause of action under Title IX for teacher-on-student sexual harassment recognized . . . in *Franklin* would not be supported by the majority's view of legislative history. *Davis*, 120 F.3d at 1413-14 (Barkett, Hatchett, Henderson, and Kravitch,

JJ., dissenting) (citations omitted). The dissent also took issue with the majority's conclusion regarding the applicability of Title VII principles, noting that "at least five circuit courts have found that Title IX standards are applicable to students' Title IX sexual harassment claims." *Id.* at 1415. The dissent applied these principles to conclude that Petitioner had stated a cause of action under Title IX. *Id.* at 1418-19.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE SPLIT IN THE CIRCUITS REGARDING TITLE IX'S APPLICATION TO PEER SEXUAL HARASSMENT.

The Eleventh Circuit's decision in this case exacerbates two principal splits among circuit courts addressing peer sexual harassment claims under Title IX: (1) whether Title IX requires a school to take appropriate corrective action in response to student-to-student sexual harassment of which the school knew or should have known; and (2) whether Title VII sexual harassment principles should guide courts' resolution of school liability for sexual harassment under Title IX.[2]

A. The Circuits Are Split on Whether Title IX Imposes an Obligation on Schools To Address Student-to-Student Sexual Harassment.

With the decision below, the Eleventh Circuit joins the ranks of the Fifth Circuit in ruling that Title IX does not require federally funded schools to take any corrective action to remedy a sexually hostile environment created

[2] In the interest of brevity, Petitioner uses the terms "school" or "schools" generally to refer to any education program or activity that receives federal funds, including colleges and universities, and notes that the unsettled questions of law discussed herein affect all entities that operate such programs or activities. *See* 20 U.S.C. § 1687.

by other students. The Eleventh Circuit forecloses Title IX liability for a school's improper response or failure to respond to sexual harassment by student-harassers. *Davis*, 120 F.3d at 1401. In this regard, the Eleventh Circuit takes a similar, though slightly more constrictive view of Title IX liability than the Fifth Circuit did in *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006 (5th Cir. 1996). In *Rowinsky*, the Fifth Circuit ruled that Title IX liability may be established in a peer sexual harassment case only where the school responds differently to sexual harassment complaints based on the gender of the complainant. *Id.* at 1016.[3] Both the Fifth and Eleventh Circuits effectively counsel schools that they may comply with Title IX by ignoring all student complaints of a sexually hostile environment created by other students.

The Ninth Circuit has charted an entirely different course for school liability in peer sexual harassment cases under Title IX. Just eight days before the Eleventh Circuit issued its opinion in this case, the Ninth Circuit ruled that Title IX requires school officials to take prompt and appropriate corrective action to remedy sexual harassment by students. In *Oona, R.S. v. McCaffrey*, 122 F.3d 1207, 1209-11 (9th Cir. 1997), the court held that school officials did not have qualified immunity in a peer sexual harassment case based on conduct that occurred in 1992, because it was clearly established, as of this Court's decision in *Franklin*, that Title IX requires schools to take prompt and appropriate action to remedy a hostile environment created by students.[4] Acknowledging that its

[3] Although the Eleventh Circuit did not address the situation alluded to by the Fifth Circuit in *Rowinsky*, where a school responds differently to peer sexual harassment based on the gender of the complainant, the *Davis* court's reasoning, that school boards lacked notice of any potential liability for peer sexual harassment under Title IX, presumably would foreclose liability under that scenario as well. *See Davis*, 120 F.3d at 1401.

[4] This ruling builds on the court's earlier decision in *Doe v. Petaluma City School District*, 54 F.3d 1447 (9th Cir. 1995), which

ruling conflicted with the Fifth Circuit's decision in *Rowinsky*, the court explained:

> We have difficulty squaring *Rowinsky*'s reasoning with the Supreme Court's in *Franklin* and our own in *Petaluma*. They provide no basis for interpreting discrimination under Title IX so restrictively.

Oona, 122 F.3d at 1210. Consequently, schools and school officials in the Ninth Circuit have a duty under Title IX to take reasonable steps to stop peer sexual harassment of students once they have notice that it is occurring.

Aligning itself with the Ninth Circuit, at least in its articulation of the elements required to establish a Title IX peer sexual harassment claim, the Tenth Circuit also has recognized a cause of action for peer sexual harassment under Title IX. In *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996), the Tenth Circuit adopted the five-part test set forth in the Eleventh Circuit's prior panel decision in this case, recognizing a Title IX action for student-to-student sexual harassment where: (1) the victim is a member of a protected group; (2) he or she was subject to unwelcome sexual harassment; (3) the harassment experienced was based on sex; (4) the harassment was sufficiently severe or pervasive as to create an abusive educational environment; and (5) some basis for institutional liability exists.[5] *Id.* at 1232 (citing *Davis*, 74 F.3d at 1194 (panel decision)). However, despite its

held that city school officials had qualified immunity from suit based on their failure to respond to peer sexual harassment before 1992, but suggested that it would reach a different result with respect to conduct occurring after the Supreme Court's decision in *Franklin*. *Id.* at 1452.

[5] The court declined to address the proper standard for establishing institutional liability in Title IX peer sexual harassment claims because it determined that the plaintiff failed to establish that the challenged conduct was based on sex. *Seamons*, 84 F.3d at 1233 n.7.

articulation of the elements of a Title IX peer sexual harassment claim based on the prior panel decision in *Davis*, the Tenth Circuit applied the test in a manner closer to the Fifth Circuit's formulation in *Rowinsky*, requiring the school's reaction to the harassment, as opposed to the harassment itself, to be "sexual" or "based on sex."[6] *Id.* at 1233. The Tenth Circuit's selective incorporation of elements from both sides of the circuit split on this issue reflects the muddled state of the law in this area.

In addition to the Ninth and Tenth Circuits, several other circuit courts, while not directly holding schools liable for failing to respond to peer sexual harassment, have suggested that schools may face Title IX liability in such cases. *See Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 540 (1st Cir. 1995) (suggesting that schools may be liable for failing to respond to hostile environment sexual harassment by third party, but holding that no hostile environment existed in that case); *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 248-50 (2d Cir. 1995) (suggesting that school may be liable for failure to remedy known sexual harassment of dental student by patient, but finding that school did not have sufficient notice of harassment in that case).

Reflecting the circuit split on this issue, numerous district courts have reached opposite conclusions when faced with the question of whether Title IX imposes on schools any obligation to respond to peer sexual harassment once they have notice that such harassment is occurring. Most district courts that have addressed the issue have held

[6] The *Seamons* court's application of the "based on sex" requirement to the school's conduct, as opposed to the underlying harassment, may stem from the plaintiff's failure in that case to allege that the harassment itself was based on the student's sex, thus forcing the court to focus the "based on sex" inquiry elsewhere. *Seamons*, 84 F.3d at 1232-33.

that Title IX does impose such an obligation. *See, e.g., Doe v. Londonderry Sch. Dist.*, 970 F. Supp. 64, 74 (D.N.H. 1997); *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369, 1377 (N.D. Cal. 1997); *Collier v. William Penn Sch. Dist.*, 956 F. Supp. 1209, 1212 (E.D. Pa. 1997); *Franks v. Kentucky Sch. for the Deaf*, 956 F. Supp. 741, 746 (E.D. Ky. 1996); *Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412, 1419-20 (W.D. Iowa 1996); *Bruneau v. South Kortright Central Sch. Dist.*, 935 F. Supp. 162, 172-74 (N.D. N.Y. 1996); *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1426-27 (N.D. Cal. 1996); *Burrow v. Postville Community Sch. Dist.*, 929 F. Supp. 1193, 1204-06 (N.D. Iowa 1996); *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006, 1023 (W.D. Mo. 1995).[7] However, district courts in the Fifth Circuit have held that a school's failure to respond to known student-to-student sexual harassment does not violate Title IX. *See, e.g., Piwonka v. Tidehaven Indep. Sch. Dist.*, 961 F. Supp. 169, 171 (S.D. Tex. 1997); *Garza v. Galena Park Indep. Sch. Dist.*, 914 F. Supp. 1437, 1438 (S.D. Tex. 1994).

Thus, the liability standard governing a particular school in a Title IX peer sexual harassment case will vary widely depending on where the school is located. While schools in the Fifth and Eleventh Circuits may safely ignore all student complaints of sexual harassment by

[7] Even these courts differ with respect to the level of proof required to demonstrate intentional discrimination in a peer sexual harassment claim for damages under Title IX. *Compare Petaluma*, 949 F. Supp. at 1424 ("[H]ostile environment sexual harassment is a type of intentional discrimination, but the intent is established by proof of the elements required to prove the cause of action and needs no additional proof."), *and Franks*, 956 F. Supp. at 748 (adopting *Petaluma* standard), *with Wright*, 940 F. Supp. at 1419-20 (requiring plaintiff to prove school district's intent to discriminate separate from elements of hostile environment claim in order to obtain damages, but permitting intent to be inferred from school's actual knowledge of harassment and intentional failure to act), *and Bosley*, 904 F. Supp. at 1020-21, 1023 (same).

other students, schools in the First, Second, Ninth and Tenth Circuits risk Title IX liability for the same course of conduct. Schools operating in other circuits, unless governed by one of the conflicting district court decisions addressing Title IX's application to peer sexual harassment claims, face the unenviable task of trying to make sense of this legal morass. Although a recent policy guidance issued by the Department of Education's Office for Civil Rights attempts to give schools guidance with regard to their legal obligation to respond to peer harassment,[8] it acknowledges that it is not authoritative in the Fifth Circuit after *Rowinsky* (nor, presumably, would it be controlling in the Eleventh Circuit after the *en banc* decision in this case),[9] and a number of courts have refused to grant it deference.[10] It is time for this Court

[8] *See* Office for Civil Rights, Dep't of Educ., *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034 (Mar. 13, 1997).

[9] *Id.* at 12,036.

[10] *See Smith v. Metro. Sch. Dist. Perry Township*, No. 95-3818, 1997 U.S. App. LEXIS 29085, at *64 (7th Cir. Oct. 22, 1997) (refusing to defer to OCR's final policy guidance); *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 658 (5th Cir. 1997) (refusing to defer to OCR's draft guidances on ground that government cannot modify past agreements with recipients of Title IX funds). *But see Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 411 (5th Cir. 1996) (Dennis, J., dissenting) (urging great deference to OCR's draft policy guidances), *reh'g denied*, 106 F.3d 399 (5th Cir. 1997), *and cert. denied*, 117 S. Ct. 2434 (1997); *Londonderry*, 970 F. Supp. at 72 (deferring to OCR's final policy guidance); *Collier*, 956 F. Supp. at 1213 (deferring to OCR's practice of applying Title VII principles to Title IX peer harassment cases). As one Judge has observed:

> Unfortunately, the Supreme Court has heretofore not been called upon to determine how much "more deference" than no deference we should apply when construing OCR policy guidelines. Thus, courts have seen fit to arbitrarily pick and choose

to step into the fray and clarify the legal standards governing Title IX peer sexual harassment claims.

B. The Circuits Are Split on Whether Title VII Principles Should Guide Courts in Determining School Liability in Hostile Environment Cases Under Title IX.

Taking their lead from this Court's decision in *Franklin*, 503 U.S. at 75, which cited Title VII authority in support of its ruling that a teacher's sexual harassment of a student constitutes intentional discrimination under Title IX, the First, Second, Sixth, Eighth and Ninth Circuits have invoked Title VII sexual harassment principles to define the contours of school liability under Title IX for subjecting students to a sexually hostile environment. *See Hot, Sexy, and Safer Prods., Inc.*, 68 F.3d at 540 (1st Cir.); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897-901 (1st Cir. 1988); *Kracunas v. Iona College*, 119 F.3d 80, 86-88 (2d Cir. 1997); *Murray*, 57 F.3d at 248-49 (2d Cir.); *Doe v. Claiborne County*, 103 F.3d 495, 514-15 (6th Cir. 1996); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 469 (8th Cir. 1996); *Oona*, 122 F.3d at 1210 (9th Cir.). *Cf. Seamons*, 84 F.3d at 1232-33 (purporting to apply Title VII framework to Title IX peer sexual harassment case, but departing from this framework by requiring the school's response to be on the basis of sex).

Drawing on Title VII principles, these Circuits have interpreted Title IX to require schools to respond appropriately to the sexual harassment of students if they knew or should have known of the harassment, whether the harasser is a student, *see Oona*, 122 F.3d at 1209-10; school employee, *see Claiborne*, 103 F.3d at 515; *Kinman*, 94 F.3d at 469; *Lipsett*, 864 F.2d at 899-901; or other person, *see Hot, Sexy and Safer Prods., Inc.*, 68 F.3d at 540 (independent contractor); *Murray*, 57 F.3d at 249-50 (dental school patient).

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the level of deference they wish to implement in cases such as this one.

Smith, 1997 U.S. App. LEXIS 29085, at *83 (Coffey, J., concurring) (citations omitted).

In contrast to these courts, the Fifth, Seventh and Eleventh Circuits have refused to apply Title VII principles to determine school liability for hostile environment claims brought by students under Title IX. *See Smith v. Metro. Sch. Dist. Perry Township*, No. 95-3818, 1997 U.S. App. LEXIS 29085, at *40 (7th Cir. Oct. 22, 1997); *id.* at *75-*81 (Coffey, J., concurring); *Davis* 120 F.3d at 1394 n.6, 1399 n.13; *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 655-58 (5th Cir. 1997); *Rowinsky*, 80 F.3d at 1011 & n.11.

In the Circuits that have rejected the application of Title VII principles to Title IX sexual harassment cases, a more restrictive standard governs school liability for sexual harassment under Title IX. *See Davis*, 120 F.3d at 1401 (refusing to recognize Title IX action based on school's response to peer sexual harassment); *Rosa H.*, 106 F.3d at 658-60 (requiring plaintiff in teacher-student sexual harassment claim prove that employee with supervisory power over teacher had actual knowledge, akin to Eighth Amendment deliberate indifference standard, and authority to take action that would end harassment, yet failed to act); *Smith*, 1997 U.S. App. at *65-*66 (same); *Rowinsky*, 80 F.3d at 1016 (requiring plaintiff in peer sexual harassment case to demonstrate that school responded to sexual harassment claims differently based on sex).

A large number of district courts also have struggled with the question of whether Title VII principles should guide school liability for hostile environment sexual harassment under Title IX, with conflicting results. While the majority of district courts that have spoken on the issue have borrowed Title VII principles to determine school liability in Title IX sexual harassment claims, *see, e.g., Nicole M.*, 964 F. Supp. at 1377-78 (peer harassment);

Collier, 956 F. Supp. at 1213 (same); *Franks*, 956 F. Supp. at 746-47 (same); *Petaluma*, 949 F. Supp. at 1421 (same); *Bosley*, 904 F. Supp. at 1020-25 (same); *Kadiki v. Virginia Commonwealth Univ.*, 892 F. Supp. 746, 753 (E.D. Va. 1995) (harassment by school employee); *Saville v. Houston County Healthcare Auth.*, 852 F. Supp. 1512, 1521, 1526 (M.D. Ala. 1994) (same); *Hastings v. Hancock*, 842 F. Supp. 1315, 1318 (D. Kan. 1993) (same); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1290 (N.D. Cal. 1993) (same), several district courts have rejected Title VII principles in Title IX sexual harassment cases, *see, e.g., Howard v. Board of Educ.*, 876 F. Supp. 959, 974 (N.D. Ill. 1995) (teacher-student harassment); *Garza*, 914 F. Supp. at 1438 (peer harassment); *Floyd v. Waiters*, 831 F. Supp. 867, 876 (M.D. Ga. 1993) (harassment by school employee), and the remainder have applied Title VII principles selectively with some modification, *see, e.g., Londonderry*, 970 F. Supp. at 74-75 (rejecting Title VII constructive notice standard and requiring actual notice); *Wright*, 840 F. Supp. at 1419-20 (same); *Bruneau*, 935 F. Supp. at 171-77 (same); *Burrow*, 929 F. Supp. at 1204-05 (same); *Slaughter v. Waubonsee Community College*, No. 94-C-2525, 1995 WL 578296, at *3-*4 (N.D. Ill. Sept. 29, 1995) (applying Title VII principles to teacher-student hostile environment claim, but rejecting Title VII agency principles in Title IX quid pro quo cases).

The split in the courts as to whether school liability for sexual harassment under Title IX should turn on the standards that have developed to govern employer liability for sexual harassment under Title VII goes to the heart of the dispute in this case. *Compare Davis*, 120 F.3d at 1399 n.13 (*en banc*) (refusing to apply Title VII standards to determine school liability for sexual harassment under Title IX), *with id.* at 1415-18 (Barkett, Hatchett, Kravitch and Henderson, JJ., dissenting) (arguing that Title VII principles should guide analysis of school liability

for sexual harassment under Title IX), *and Davis*, 74 F.3d at 1190-95 (panel decision) (applying Title VII principles to hold schools liable under Title IX for failing to respond to complaints of peer sexual harassment). This Court should grant the Petition to provide much-needed guidance to the lower courts as to the proper standard for determining school liability for sexual harassment under Title IX. *Cf. Smith*, 1997 U.S. App. LEXIS 29085, at *111 (Rovner, J., dissenting) (stating that "[m]uch ink has already been spilled addressing the issue of the appropriate standard for institutional liability under Title IX," and that "the Supreme Court must ultimately resolve the division amongst the circuits").

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT.

The Eleventh Circuit has construed Title IX in a manner that is at odds with well-established precedents of this Court and frustrates Congress' intent to eliminate sex discrimination in federally funded education. The decision below relies on a constricted view of Title IX to conclude that the statute does not recognize a cause of action for peer sexual harassment, "no matter how egregious—or even criminal—the harassing discriminatory conduct may be, and no matter how cognizant of it supervisors may become." *Davis*, 120 F.3d at 1412 (Barkett, Hatchett, Kravitch and Henderson, JJ., dissenting). The Eleventh Circuit's decision contradicts this Court's rulings and its promises not to allow "federal moneys to be expended to support the intentional actions [Congress] sought by statute to proscribe" when it enacted Title IX. *Franklin*, 503 U.S. at 75.

A. The Decision Below Contravenes This Court's Mandate To Read Title IX Broadly.

The Eleventh Circuit's cramped reading of Title IX conflicts with this Court's mandate "to accord [the stat-

ute] a sweep as broad as its language." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (citations omitted). Contrary to this Court's precedents, the Eleventh Circuit has concluded that Title IX's expansive prohibition against sex discrimination is not broad enough to encompass peer hostile environment sexual harassment, a form of sex discrimination.[11] The Eleventh Circuit reached this result through an over-reliance on the absence of explicit language banning student-to-student sexual harassment in Title IX's statutory scheme or legislative history, an approach this Court repeatedly has eschewed.

Time and again, this Court has construed Title IX broadly, recognizing that doing so is essential to realize Congress' goal of eradicating sex discrimination in federally funded education. Accordingly, even in the absence of explicit statutory language, this Court has interpreted Title IX to reach employment discrimination, *North Haven*, 456 U.S. at 521, 530; provide a private right of action, *Cannon v. University of Chicago*, 441 U.S. 677 (1979); and provide compensatory damages for violations, *Franklin*, 503 U.S. at 76. Despite Title IX's silence regarding each issue, this Court has concluded that the breadth of Title IX's proscriptive language, coupled with Congress' intent to eliminate sex discrimination in education, requires an interpretation that furthers those goals. *See, e.g., Cannon*, 441 U.S. at 709 ("Not only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination."). In contrast, the Eleventh Circuit interpreted Title IX's broad language

[11] *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *see also* 29 C.F.R. § 1604.11(d) (Equal Employment Opportunity Commission Guideline stating that an employer is responsible under Title VII for sexual harassment between fellow employees "where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action").

to restrict liability and release educational institutions from any obligation to address sexually hostile environments created by students.

B. The Decision Below Is at Odds With *Franklin*.

The Eleventh Circuit's decision also conflicts with this Court's holding in *Franklin* upholding an action for damages under Title IX for sexual harassment. The decision below rejects this Court's use of Title VII principles to analyze Title IX sexual harassment claims and misapprehends this Court's conclusion that allowing sexually hostile environments to persist establishes liability for intentional discrimination. *Franklin*, 503 U.S. at 75.

Just as in the case at bar, the petitioner in *Franklin*, a student, sought relief for a sexually hostile environment of which school officials were aware, but refused to remedy. *Id.* at 63-64. This Court concluded that a cause of action for teacher-to-student sexual harassment exists under Title IX and that compensatory damages are available under the statute. *Id.* at 75. In reaching this holding, this Court relied on Title VII principles to explain that sexual harassment is intentional discrimination actionable under Title IX:

> Th[e] notice problem does not arise in a case such as this, in which intentional discrimination is alleged. Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex."

Id. at 74-75. Significantly, this Court relied on *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986), where it first recognized hostile environment sexual harassment as a form of sex discrimination prohibited by Title VII to support its analysis, demonstrating that the well-established principles developed under that statute to examine

sexual harassment claims also apply to this form of sex discrimination in the Title IX context.

The *Davis* decision departs significantly from this Court's ruling in *Franklin* in many respects. Contrary to this Court's decision, the Eleventh Circuit construed Title IX's silence regarding sexual harassment to preclude imposing any obligation whatsoever upon federally funded educational institutions to address student-to-student sexual harassment. *Davis*, 120 F.3d at 1397. Further contravening this Court, the Eleventh Circuit refused to apply Title VII principles to its analysis, concluding that schools, unlike employers, had no obligation to provide students with a nondiscriminatory environment. *See id.* at 1400 n.13. In addition, failing to recognize that sexual harassment is intentional discrimination, the Eleventh Circuit again departed from *Franklin* to hold that Title IX, as Spending Clause legislation,[12] had not given schools sufficient notice of their obligations under the statute to prohibit such discrimination. *Id.* at 1406.

The Eleventh Circuit's conclusion that Title IX does not require federally funded schools to remedy student-created sexually hostile environments simply cannot be squared with decisions of this Court. As *Franklin* makes plain, Title IX's broad purpose to eradicate sex discrimination in federally funded education requires recipients to maintain environments free from such discrimination. Thus, under this Court's precedents, Title IX mandates that schools take steps to end sexual harassment when they know or should know that it is occurring. The Eleventh Circuit's ruling departs from this authority, enabling federally funded schools to allow this pernicious

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[12] As in *Franklin*, because sexual harassment is intentional discrimination, this Court need not decide whether Title IX was enacted pursuant to the Spending Clause, Section Five of the Fourteenth Amendment, or both to decide whether Title IX requires schools to remedy a sexually hostile environment created by students. *Franklin*, 503 U.S. at 75 n.8.

form of sex discrimination to interfere with students' educational experiences. This Court should grant the Petition to correct the Eleventh Circuit's departure from this Court's authority.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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November 19, 1997

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APPENDICES

APPENDIX A

[Filed Aug. 21, 1997]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-9121

D.C. Docket No. 94-CV-140-4MAC(WDO)

AURELIA DAVIS,
as Next Friend of LaShonda D.,
Plaintiff-Appellant,

versus

MONROE COUNTY BOARD OF EDUCATION, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

(August 21, 1997)

Before HATCHETT, Chief Judge, TJOFLAT, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, Circuit Judges,* and

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* Judge R. Lanier Anderson recused himself and did not participate in this decision.

KRAVITCH ** and HENDERSON, Senior Circuit Judges.

TJOFLAT, Circuit Judge:

Appellant, Aurelia Davis, brought this suit against the Board of Education of Monroe County, Georgia, (the "Board") and two school officials, Charles Dumas and Bill Querry, on behalf of her daughter, LaShonda Davis. The complaint alleged that the defendants violated Section 901 of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235, 373 (1972) (codified as amended at 20 U.S.C. § 1681 (1994)) ("Title IX"), and 42 U.S.C. § 1983 [1] by failing to prevent a student at Hubbard Elementary School ("Hubbard") from sexually harassing LaShonda while she was a student there. Appellant separately alleged that the defendants discriminated against LaShonda on the basis of race in violation of 42 U.S.C. § 1981.[2] Appellant sought injunctive relief and $500,000 in compensatory and punitive damages.

** Senior Judge Phyllis A. Kravitch, who was a member of the en banc court which heard oral argument in this case, took senior status on January 1, 1997, and has elected to participate in this decision pursuant to 28 U.S.C. § 46(c).

[1] This section provides, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . ." 42 U.S.C. § 1983 (1994).

[2] Davis actually alleged that the named defendants discriminated on the basis of race in violation of "the Education Act of 1972 and the Civil Rights Act of 1991." Davis was apparently referring to the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (1972), and the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). The former act, however, does not address racial discrimination in education, and the latter act does not provide a cause of action for racial discrimination in education. The district court construed this portion of the complaint to allege a violation of 42 U.S.C. § 1981, which does provide a cause of action against certain types of racial discrimination.

The district court dismissed appellants complaint in its entirety for failure to state a claim upon which relief can be granted. *See Aurelia D. v. Monroe County Bd. of Educ.*, 862 F. Supp. 363, 368 (M.D. Ga. 1994); *see also* Fed. R. Civ. P. 12(b)(6). Appellant appealed the district court's dismissal of her Title IX claim against the Board,[3] arguing that a school board can be held liable under Title IX for its failure to prevent sexual harassment among students. On appeal, a divided three-judge panel reinstated her Title IX claim against the Board. *See Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1195 (11th Cir. 1996). At the Board's request, we granted rehearing en banc to consider appellant's Title

[3] Davis did not appeal the district court's dismissal of her Title IX claim with regard to individual defendants Dumas and Querry. Davis similarly did not appeal the district court's dismissal of her § 1981 claim. Therefore, we do not consider these claims.

With regard to Davis' § 1983 claim, the complaint seemed to allege that the defendants were liable under this provision solely because they violated Title IX. Davis, however, apparently argued before the district court that the defendants were liable under § 1983 for infringing LaShonda's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The district court dismissed this implied claim under Rule 12(b)(6). *See Aurelia D.*, 862 F. Supp. at 366.

Davis did not appeal the dismissal of her § 1983 claim to the extent it was based on the defendants' alleged violation of Title IX. Accordingly, that claim is not before us. She did, however, appeal the dismissal of her § 1983 claim to the extent it was based on the defendants' alleged violation of the Due Process Clause. In addition, Davis argued for the first time before the three-judge panel that the same § 1983 claim encompassed a violation of the Equal Protection Clause of the Fourteenth Amendment.

The panel rejected Davis' due-process and equal-protection arguments and affirmed the dismissal of her steadily expanding § 1983 claim under 11th Cir. R. 36-1. *See Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1188 (1996). Davis did not petition the court to rehear this ruling en banc, and we see no reason to disturb the panel's decision *sua sponte*. We therefore do not consider Davis' various § 1983 claims. In sum, we address only Davis' Title IX claim against the Board.

IX claim,[4] and we now affirm the district court's dismissal of this claim.

I.

A.

We review *de novo* the district court's dismissal of appellant's complaint for failure to state a claim upon which relief can be granted. *See McKusick v. City of Melbourne*, 96 F.3d 478, 482 (11th Cir. 1996). To this end, we take as true the allegations appellant has set forth in her complaint and examine whether those allegations describe an injury for which the law provides relief. *See Welch v. Laney*, 57 F.3d 1004, 1008 (11th Cir. 1995). We construe appellant's allegations liberally because the issue is not whether appellant will ultimately prevail but whether she is entitled to offer evidence to support her claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974). We begin by describing the allegations contained in appellant's complaint.

B.

LaShonda Davis was enrolled as a fifth-grade student at Hubbard during the 1992-1993 school year. During that school year, Bill Querry was the principal of Hubbard, and Diane Fort, Joyce Pippin, and Whit Maples were teachers at the school. The complaint alleges that the Board administered federally funded educational programs at Hubbard and supervised the school's employees, including Principal Querry and Teachers Fort, Pippin, and Maples.

According to the complaint, a fifth-grade student named "G.F." was in several of LaShonda's classes and initially was assigned to the seat next to LaShonda in Fort's classroom. On December 17, 1992, while in Fort's classroom,

[4] *See Davis v. Monroe County Bd. of Educ.*, 91 F.3d 1418 (11th Cir. 1996). Granting rehearing en banc vacated the panel opinion by operation of law. 11th Cir. R. 35-11.

G.F. allegedly tried to touch LaShonda's breasts and vaginal area. G.F. also allegedly directed vulgarities at LaShonda, such as "I want to get in bed with you" and "I want to feel your boobs." LaShonda complained to Fort. After school that day, LaShonda also told her mother, the appellant, about G.F.'s behavior. The complaint states that G.F. engaged in similar (although unspecified) conduct on or about January 4, 1993,[5] and again on January 30, 1993. LaShonda allegedly reported both incidents to Fort and to appellant. After one of these first three incidents, appellant called Fort, who told appellant in the course of their conversation that Principal Querry knew about one of the incidents.

G.F.'s misconduct continued. On February 3, 1993, G.F. allegedly placed a door-stop in his pants and behaved in a sexually suggestive manner toward LaShonda during their physical education class. LaShonda reported this incident to Maples, who was the physical education teacher. On February 10, 1993, G.F. engaged in unspecified conduct similar to that of the December 17 incident in the classroom of Pippin, another of LaShonda's teachers. LaShonda notified Pippin of G.F.'s behavior and later told appellant, who then called Pippin to discuss the incident. On March 1, 1993, G.F. directed more unspecified, offensive conduct toward LaShonda during physical education class. LaShonda reported G.F. to Maples and Pippin. An unidentified teacher allegedly told LaShonda that Principal Querry was not ready to listen to her complaint about G.F.

At some point around March 17, 1993, Fort allowed LaShonda to change assigned seats away from G.F. G.F.,

[5] The complaint actually alleges that this second instance of harassment occurred "on or about January 2, 1993." We note that January 2, 1993 was a Saturday. Presumably, there was no school on Saturday, so G.F. could not have sexually harassed LaShonda at Hubbard on that day. Friday, January 1, 1993, was a holiday. Accordingly, we assume for appellant's benefit that the alleged harassment occurred on or about January 4, 1993.

however, persisted in his unwelcome attentions. On April 12, 1993, he rubbed his body against LaShonda in a manner she considered sexually suggestive; this incident occurred in the hallway on the way to lunch. LaShonda again complained to Fort.

Lastly, on May 19, 1993, LaShonda complained to appellant after school about more unspecified behavior by G.F. Appellant and LaShonda then paid a visit to Principal Querry to discuss G.F.'s conduct. At this meeting, Querry asked LaShonda why no other students had complained about G.F. During this meeting, Querry also told appellant, "I guess I'll have to threaten [G.F.] a little bit harder." On the same day, May 19, G.F. was charged with sexual battery, a charge which he apparently did not deny. The complaint does not tell us who summoned the police.

In all, the complaint describes eight separate instances of sexual harassment by G.F. These eight instances of alleged harassment occurred, on average, once every twenty-two days over a six-month period. Three instances occurred in Fort's classroom; two occurred in Maple' physical education class; one occurred in Pippin's classroom; one occurred in a school hallway; and one occurred in an unspecified location. LaShonda reported four instances of alleged harassment to Fort, two to Maples, and two to Pippin. LaShonda reported the final instance of harassment, the May 19 incident, to appellant and Querry. The complaint does not allege that any faculty member knew of more than four instances of harassment, and the complaint indicates that Principal Querry learned of only one instance of harassment before his meeting with appellant and LaShonda on May 19.

The complaint does not state what action each of the teachers took upon being informed by LaShonda of G.F.'s demeaning conduct. We assume for appellant's benefit that the teachers took no action other than Fort's apparent notification of Principal Querry after one of the first

three instances of alleged harassment and Fort's decision around March 17, 1993, to move LaShonda's assigned seat away from that of G.F. We will also accept as true that Principal Querry took no measures against G.F. other than threatening him with disciplinary action at some point before his May 19 meeting with appellant and her daughter. For example, we assume for appellant's benefit that someone other than the school staff instigated the prosecution of G.F.

Appellant claims that LaShonda suffered mental anguish because of G.F.'s behavior. As indicia of this emotional trauma, the complaint states that LaShonda's grades dropped during the 1992-1993 school year and that LaShonda wrote a suicide note in April 1993. Based on the above allegations, appellant contends that "[t]he deliberate indifference by Defendants to the unwelcomed [sic] sexual advances of a student upon LaShonda created an intimidating, hostile, offensive and abuse [sic] school environment in violation of Title IX." We therefore consider whether Title IX allows a claim against a school board based on a school official's failure to remedy a known hostile environment [6] caused by the sexual harassment of one student by another ("student-student sexual harassment").

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[6] The term "hostile environment" sexual harassment originated in employment litigation under § 703 of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 255 (1964) (codified at 42 U.S.C. § 2000e-2 (1994)) ("Title VII"). Hostile-environment sexual harassment occurs whenever an employee's speech or conduct creates an atmosphere that is sufficiently severe or pervasive to alter another employee's working conditions. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22, 114 S. Ct. 367, 370-71, 126 L. Ed. 2d 295 (1993). As discussed *infra*, n.13, we conclude that Title VII standards of liability, borrowed from the employment context, do not control our resolution of this case. Nevertheless, for purposes of our discussion of appellant's claim, we construe the complaint to allege that G.F.'s speech or conduct created an atmosphere that was sufficiently hostile or abusive to alter the conditions of LaShonda's learning environment.

II.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (1994). Although nothing in the plain language of Title IX speaks to the issue of student-student sexual harassment, several district courts have held that Title IX allows a student to sue a school board for failing to prevent hostile-environment sexual harassment by another student. *See Doe v. Londonderry Sch. Dist.*, No. 95-469-JD, http://lw.bna.com/#0708 (D. N.H. June 13, 1997); *Nicole M. v. Martinez Unified Sch. Dist.*, No. C-93-4531 MHP, 1997 WL 193919, at *8 (N.D. Cal. Apr. 15, 1997); *Collier v. William Penn Sch. Dist.*, 956 F. Supp. 1209, 1213-14 (E.D. Pa. 1997); *Bruneau By and Through Schofield v. South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162, 172 (N.D.N.Y. 1996); *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1576 (N.D. Cal. 1993), *rev'd on other grounds*, 54 F.3d 1447 (9th Cir. 1995); *Burrow v. Postville Community Sch. Dist.*, 929 F. Supp. 1193, 1205 (N.D. Iowa 1996); *Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412, 1419-20 (N.D. Iowa 1996); *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006, 1023 (W.D. Mo. 1995); *Oona R.-S. v. Santa Rosa City Schs.*, 890 F. Supp. 1452, 1469 (N.D. Cal. 1995); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1293 (N.D. Cal. 1993). *But see Garza v. Galena Park Indep. Sch. Dist.*, 914 F. Supp. 1437, 1438 (S.D. Tex. 1994) ("[A] student cannot bring a hostile environment claim under Title IX.").

The courts of appeals, however, have been less enthusiastic. The Fifth Circuit has held that no cause of action exists where a school board merely knew or should have known of peer sexual harassment and failed to act. *See Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir.), *cert. denied*, —— U.S. ——, 117 S. Ct. 165, 136 L. Ed. 2d 108 (1996). Other circuits have resolved complaints of student-student sexual harassment without deciding whether a cause of action exists under Title IX for this alleged harm. *See, e.g., Seamons v. Snow*, 84 F.3d 1226, 1232-33 (10th Cir. 1996) (holding that the plaintiff failed to state a valid claim for student-student sexual harassment because he failed to allege that the harassment in question was on account of his sex); *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 250 (2nd Cir. 1995) (holding that, even if Title IX created a private cause of action for sexual harassment by a non-employee of the school, plaintiff failed to allege that school officials knew or should have known of the harassment); *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1452 (9th Cir. 1994) (holding that a defendant school counselor was entitled to qualified immunity against a claim that he failed to respond to known sexual harassment of the plaintiff by other students).

The Supreme Court has not squarely addressed the issue of student-student sexual harassment. In general, the Court has allowed private plaintiffs to proceed under Title IX only in cases that allege intentional gender discrimination by the administrators of educational institutions. According to the Court, plaintiffs can state a claim under Title IX by alleging that a federally funded educational institution, acting through its employees, intentionally subjected them to discrimination in its educational programs or activities. *See Cannon v. University of Chicago*, 441 U.S. 677, 709, 99 S. Ct. 1946, 1964, 60 L. Ed. 2d 560 (1979). For example, where a teacher engaged a student in sexually oriented conversations, solicited dates from her, forcibly kissed her on the mouth, and thrice removed her from another class in order to engage in coercive sexual intercourse with her in a private office at the school, the Court found that the school board could be held liable for his actions. *See Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 63-64, 76, 112 S. Ct. 1028, 1031, 1038, 117 L. Ed. 2d 208 (1992).

Neither the Supreme Court nor this court has ever found, however, that a school board can be held liable for failing to prevent *non-employees* from discriminating against students on the basis of sex. Appellant does not allege that any employee of the Board intentionally discriminated against LaShonda by personally participating in G.F.'s offensive conduct toward her. Rather, appellant alleges that the Board violated Title IX by failing adequately to respond to LaShonda's complaints. Neither the Supreme Court nor this court has considered whether a Title IX plaintiff can proceed under this theory. In short, by seeking direct liability of the Board for the wrongdoing of a student, appellant argues for an extension of liability under Title IX. We examine the legislative history of Title IX to determine whether Congress intended this provision to reach appellant's allegations.

A.

The provision now known as Title IX emerged from a flurry of bills regarding public education. In June and July 1970, the House Subcommittee on Education of the House Committe on Education and Labor, under the leadership of Representative Edith Green, held hearings on gender discrimination in federally funded educational programs. *See Discriminaiton against Women: Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (1970) [hereinafter *House Hearings*]. None of the testimony before Representative Green's subcommittee concerned student-student sexual harassment or related issues, such as school discipline. Instead, the subcommittee's work focused on eliminating gender discrimination in school admissions and in the employment decisions of school administrators.

By 1970, section 703 of the Civil Rights Act of 1964 already prohibited gender discrimination in employment. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (1964) (codified at 42 U.S.C. § 2000e-2

(1994)) ("Title VII").[7] Title VII, however, did not apply to educational institutions. *See* § 702, 78 Stat. at 255 (codified as amended at 42 U.S.C. § 2000e-1 (1994)). Similarly, section 601 of the Civil Rights Act prohibited racial discrimination by all recipients of federal funding. *See* § 601, 78 Stat. at 252 (codified at 42 U.S.C. § 2000d (1994)) ("Title VI").[8] Title VI did not ban gender discrimination by recipients of federal funding.

To fill this gap in antidiscrimination legislation, the subcommittee drafted a proposed amendment to H.R. 16098, 91st Cong. (1970). This amendment would have applied to schools the non-discrimination requirements of Title VII and added "sex" to the types of discrimination banned by Title VI. *See House Hearings, supra*, at 1. In other words, the subcommittee's amendment was designed to bridge the gap between Title VII and Title VI. The amendment, however, never reached the House floor. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 523 n.13, 102 S. Ct. 1912, 1919, n.13, 72 L. Ed. 2d 299 (1982).

On April 6, 1971, a new education bill was introduced in the House. *See* H.R. 7248, 92nd Cong. (1971). This bill contained a provision similar to the amendment proposed by Representative Green's subcommittee nearly one year earlier. Title X of H.R. 7248 prohibited gender discrimination in any education program or activity receiving federal financial support. H.R. Rep. No. 92-554,

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[7] Title VII states, "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1) (1994).

[8] Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1994).

at 108 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2462, 2511-12. The House report on H.R. 7248 described this provision as a response to discriminatory admissions policies and employment practices at federally funded schools. *See id.* Once again, neither the House report nor the underlying testimony discussed student-student sexual harassment.

While the House bill remained in committee, the Senate was considering a similar education bill. *See* S. 659, 92nd Cong. (1971). The Senate bill emerged from the Senate Committee on Labor and Public Welfare on August 3, 1971, without any antidiscrimination provision at all. Consequently, on August 5, 1971, Senator Birch Bayh introduced on the Senate floor an amendment to the committee's version of S. 659. *See* 117 Cong. Rec. 30,156. (1971). His amendment, like the House provision drafted by Representative Green's subcommittee, extended the antidiscrimination provisions of the Civil Rights Act of 1964 to gender discrimination by federally funded "institutions of higher learning."[9] *See id.* at 30,155. In defending his amendment, Senator Bayh did not discuss student-student sexual harassment, nor did he discuss school discipline. He focused on gender discrimination in school admissions and employment opportunities for female teachers. *See id.* at 30,155-56. In any event, the Senate rejected Bayh's amendment as non-germane, *id.* at 30,415, and the Senate passed S. 659 on August 6, 1971, without an antidiscrimination provision.

On November 3, 1971, the House began consideration of S. 659, as passed by the Senate. The House "amended" the Senate bill by striking virtually the entire contents of S. 659 and replacing it with the contents of H.R. 7248,

[9] Senator Bayh's first amendment provided, "No person . . . shall, on the ground of sex, . . . be subject to discrimination under any program or activity conducted by a public institution of higher education, or any school or department of graduate education, which is a recipient of Federal financial assistance for any education program or activity." 117 Cong. Rec. at 30,156.

including the antidiscrimination provision. *See* S. Rep. No. 92-604, at 1 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2595, 2595. The House made this change without official comment and passed its version of S. 659 on November 4, 1971. *See* 117 Cong. Rec. at 30,882.

On November 24, 1971, the Senate, by unanimous consent, referred the House version of S. 659 back to the Committee on Labor and Public Welfare, which proceeded to amend the House version to conform to the original Senate version. *See* S. Rep. No. 92-604, at 1-2 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2595, 2595-96. Once again, the committee did not discuss gender discrimination at all, much less sexual harassment among students. On February 7, 1972, the Senate committee sent its own version of S. 659 back to the floor of the Senate. *See* 118 Cong. Rec. 2806 (1972).

Once the bill returned to the Senate floor, Senator Bayh again introduced an amendment to add an antidiscrimination provision.[10] *See id.* at 5802-03. Bayh's proposal was intended to "close[] loopholes in existing legislation relating to general education programs and employment resulting from those programs." *Id.* at 5803. In support of his amendment, Senator Bayh stated,

> we are dealing with three basically diffrent types of discrimination here[:] . . . discrimination in admission to an institution, discrimination of [sic] available services or studies within an institution once students are admitted, and discrimination in employment within an institution, as a member of the faculty or whatever.

Id. at 5812. To counter these problems, Senator Bayh proposed a provision he thought would "cover such crucial

[10] Senator Bayh's second amendment stated, "No person . . . shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 118 Cong. Rec. at 5803.

aspects as admissions procedures, scholarships, and faculty employment, with limited exceptions." *Id.* at 5803. Yet again, no senator mentioned student-student sexual harassment or school discipline.

The Senate adopted Bayh's second amendment on February 28, 1972. *See* 118 Cong. Rec. at 5815 (1972). Because of irreconcilable differences between the House and Senate versions of S. 659, both Houses referred the bill to a conference committee. *See* S. Conf. Rept. No. 92-798, at 1 (1972). The conference committee reported out a joint bill containing the antidiscrimination measure now known as Title IX. The conference bill passed both Houses and was signed into law on June 23, 1972. *See* 118 Cong. Rec. at 22,702. Throughout this long legislative history, the drafters of Title IX never discussed student-student sexual harassment or the related issue of school discipline.

B.

While the legislative history of Title IX does not indicate that Congress authorized a private cause of action for student-student sexual harassment, the legislative history does show that Title IX was enacted under the Spending Clause of Article I. *See* U.S. Const. art. I, § 8, cl. 1.[11] When Congress conditions the receipt of federal funding upon a recipient's compliance with federal statutory directives, Congress is acting pursuant to its spending power. *See Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 598-99, 103 S. Ct. 3221, 3230-31, 77 L. Ed. 2d 866 (1983) (opinion of White, J.). The legislative history of Title IX indicates that Congress intended to impose upon recipients of federal educational assistance a requirement of non-discrimination on the basis of sex. The Spending Clause authorized Congress to impose this condition.

[11] Section 8 of Article I provides, in part, that "[t]he Congress shall have [the] Power To . . . provide for the . . . general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1.

Representative Green put it succinctly: "If we are writing the law, I would say that any institution could be all men or all women, but my own feeling is that they do it with their own funds and not taxpayers' funds." *Higher Education Amendments of 1971: Hearings on H.R. 32, H.R. 5191, H.R. 5192, H.R. 5193, and H.R. 7248 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 92nd Cong., 1st Sess. 581 (1971). Representative Green also quoted with approval President Nixon, who had stated, "Neither the President nor the Congress nor the conscience of the Nation can permit money which comes from all the people to be used in a way which discriminates against some of the people." 117 Cong. Rec. at 39,257 (1971) (statement of Rep. Green). To Senator Bayh, the reach of Title IX was clearly restricted to federally funded institutions. *See* 118 Cong. Rec. at 5812. In support of Title IX, Senator McGovern stated, "I urge my colleagues to take every opportunity to prohibit Federal funding of sex discrimination." 117 Cong. Rec. at 30,158. This legislative history clearly shows that Congress intended Title IX to be a "typical 'contractual' spending-power provision." *Guardians Ass'n*, 463 U.S. at 599, 103 S. Ct. at 3231.

[12] The Supreme Court has left open the question of whether Title IX was enacted under the Spending Clause. *See Franklin*, 503 U.S. at 75 n.8, 112 S. Ct. at 1038 n.8. One could argue, as did the petitioner in *Franklin*, that Title IX was enacted under § 5 of the Fourteenth Amendment, which provides Congress with the authority to enact legislation preventing states from "deny[ing] to any person . . . the equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 4.

The Equal Protection Clause, however, only protects against action by *state*-sponsored entities. *See Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S. Ct. 836, 842, 92 L. Ed. 1161 (1948). Federal funding does not make a public school a state actor. *See Blackburn v. Fisk University*, 443 F.2d 121, 123 (6th Cir. 1971). Thus, if Title IX had been enacted under the Fourteenth Amendment, then the antidiscrimination provision of Title IX would not reach federally funded schools that were not state actors. We think that the plain language of Title IX commands a different result: no

In addition to these indications of congressional intent, similarities between Title IX and Title VI indicate that Title IX was enacted pursuant to the Spending Clause. As noted above, Title VI prohibits recipients of federal funding from engaging in race discrimination. In *Guardians Association v. Civil Service Commission,* at least six members of the Supreme Court agreed that Title VI was enacted under the Spending Clause. *See* 463 U.S. at 598-99, 629, 638, 103 S. Ct. at 3230-31, 3247, 3251; *see also Lau v. Nichols,* 414 U.S. 563, 568-69, 94 S. Ct. 786, 789, 39 L. Ed. 2d 1 (1974) (describing how a school district "contractually agreed to comply with title VI" when it accepted federal funding).

As Justice White quoted from the legislative history of Title VI, "It is not a regulatory measure, but an exercise of the unquestioned power of the Federal Government to fix the terms on which Federal funds shall be disbursed." *Guardians Ass'n,* 463 U.S. at 599, 103 S. Ct. at 3231 (quoting 110 Cong. Rec. 6546 (1964) (quoting *Oklahoma v. Civil Serv. Comm'n,* 330 U.S. 127, 143, 67 S. Ct. 544, 553, 91 L. Ed. 794 (1947)) (internal quotation marks omitted). Justice White summed up the legislative philosophy behind Title VI: "Stop the discrimination, get the money; continue the discrimination, do not get the money." *Guardians Ass'n,* 463 U.S. at 599, 103 S. Ct. at 3231 (quoting 110 Cong. Rec. at 1542) (internal quotation marks omitted). This interpretation matches the plain language of Title VI, which conditions the disbursement of federal funds on the recipient's agreement not to discriminate on the basis of race. *See* 42 U.S.C. § 2000d (1994).

The language of Title IX is virtually identical to the language of Title VI. *See* 117 Cong. Rec. at 30,156

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school that receives federal funding may discriminate on the basis of gender. Therefore, we conclude that Title IX was enacted pursuant to a power that can reach non-state actors as well as state actors—the spending power. *See Rowinsky,* 80 F.3d at 1013 n.14.

(statement of Sen. Bayh). The only differences are the substitution of the words "on the basis of sex" for the words "on the ground of race, color, or national origin" and the insertion of the word "educational" in front of the words "program or activity." *See Grove City College v. Bell,* 465 U.S. 555, 586, 104 S. Ct. 1211, 1228, 79 L. Ed. 2d 516 (1984) (Brennan, J., concurring in part and dissenting in part); *compare* 42 U.S.C. § 2000d *with* 20 U.S.C. § 1681(a). Not suprisingly, the Supreme Court has found that "Title IX was patterned after Title VI." *Cannon,* 441 U.S. at 694, 99 S. Ct. at 1956.

The Supreme Court's study of the legislative history of Title IX has led it to conclude that the drafters of Title IX intended that courts interpret it in the same way they have interpreted Title VI. *Id.* at 696, 99 S. Ct. at 1957. Therefore, we find that Title IX, like Title VI, was enacted under Congress' power to spend for the general welfare of the United States. *See Rosa H. v. San Elizario Indep. Sch. Dist.,* 106 F.3d 648, 654 (5th Cir. 1997); *Lieberman v. University of Chicago,* 660 F.2d 1185, 1187 (7th Cir. 1981), *cert. denied,* 456 U.S. 937, 102 S. Ct. 1993, 72 L. Ed. 2d 456 (1982). We now consider the implications of this finding.

III.

A.

When Congress enacts legislation pursuant to the Spending Clause, it in effect offers to form a contract with potential recipients of federal funding. *See Pennhurst v. Halderman,* 451 U.S. 1, 17, 101 S. Ct. 1531, 1540, 67 L. Ed. 2d 694 (1981). Recipients who accept federal monies also accept the conditions Congress has attached to the offer. *See South Dakota v. Dole,* 483 U.S. 203, 206, 107 S. Ct. 2793, 2795-96, 97 L. Ed. 2d 171 (1987). A prospective recipient is free to decline a grant of federal funding. *See New York v. United States,* 505 U.S. 144, 168, 112 S. Ct. 2408, 2424, 120 L. Ed. 2d

120 (1992). Similarly, a current recipient may withdraw from a federal program and decline further funding if it so chooses. *See Guardians Ass'n*, 463 U.S. at 596, 103 S. Ct. at 3229. The freedom of recipients to decline prospectively or to terminate retrospectively a grant of federal funding ensures that they will remain responsive to the preferences of their local constituents. *See New York*, 505 U.S. at 168, 112 S. Ct. at 2424.

To ensure the voluntariness of participation in federal programs, the Supreme Court has required Congress to give potential recipients unambiguous notice of the conclusions they are assuming when they accept federal funding. *Pennhurst*, 451 U.S. at 17, 101 S. Ct. at 1540. A spending power provision must read like a prospectus and give funding recipients a clear signal of what they are buying. The Court has explained, "By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* With regard to the case at hand, "Congress must be unambiguous in expressing to school districts the conditions it has attached to the receipt of federal funds." *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 398 (5th Cir. 1996), cert. denied, —— U.S. ——, —— S. Ct. ——, —— L. Ed. 2d —— (1997). We therefore consider whether Congress gave the Board unambiguous notice that it could be held liable for failing to stop G.F.'s harassment of LaShonda.

Appellant and the United States Department of Justice, as *amicus curiae*, argue that Title IX gave the Board clear notice of this form of liability. Appellant points to the Supreme Court's decision in *Franklin*. In *Franklin*, the Court suggested that "th[e] notice problem does not arise in a case . . . in which intentional discrimination is alleged." 503 U.S. at 74-75, 112 S. Ct. at 1037. The Court stated that the plain language of Title IX imposes on schools a duty not to discriminate on the basis of sex, and when a school teacher sexually harasses a student,

that teacher is discriminating on the basis of sex. *Id.* at 75, 112 S. Ct. at 1037. Appellant argues that a school employee is intentionally discriminating on the basis of sex when he or she fails to prevent one student from sexually harassing another.[13] Hence, appellant asserts that the

[13] Appellant and the Department of Justice argue that we should use Title VII standards of liability to interpret Title IX. An employer is directly liable under Title VII if it is deliberately indifferent to peer sexual harassment in the workplace. *See Faragher v. City of Boca Raton*, 111 F.3d 1530, 1538-39 (11th Cir. 1997) (en banc). Appellant argues that a school should also be liable if it is deliberately indifferent to peer sexual harassment at school.

The superficial appeal of this argument has attracted the adherence of a few courts. *See, e.g., Bruneau*, 935 F. Supp. at 170-71. These courts have applied Title VII standards of liability to Title IX cases simply because (1) Title VII and Title IX both deal with sexual harassment and (2) the Supreme Court once cited a Title VII case in discussing liability under Title IX, *see generally Franklin*, 503 U.S. at 75, 112 S. Ct. at 1037 (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64, 106 S. Ct. 2399, 2404, 91 L. Ed. 2d 49 (1986)). *See Bruneau*, 935 F. Supp. at 170-71.

However, the Supreme Court has never discussed student-student sexual harassment or generally applied Title VII jurisprudence to Title IX cases. Perhaps for this reason, some courts that have imposed Title VII-type liability under Title IX have refused—without much explanation—to apply *all* of Title VII jurisprudence to Title IX. *See, e.g., Bruneau*, 935 F. Supp. at 169-70 ("[T]he Court cautions that by holding that Title VII legal standards apply to an analysis of Title IX claims, the Court is *not* holding that the entirety of Title VII jurisprudence must be applied to Title IX."). Other courts have altogether refused to apply Title VII jurisprudence to Title IX. *See, e.g., Rosa H.*, 106 F.3d at 656 ("*Franklin*'s single citation to *Meritor Savings* to support the Court's conclusion that sexual harassment is sex discrimination does not by itself justify the importation of other aspects of Title VII law into the Title IX context.").

We decline appellant's invitation to use Title VII standards of liability to resolve this Title IX case. *See Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1450-51 (9th Cir. 1994) First, Title VII and Title IX are worded differently. If Congress wished Title IX to be interpreted like the earlier-enacted Title VII, Congress would

school board here had sufficient notice, for purposes of the Spending Clause, that it could be held liable. We disagree.[14]

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have written Title IX to read like Title VII. Congress did not. Interpreting the plain language of different statutes does not automatically produce the same result simply because both statutes proscribe similar behavior.

Second, Title VII was enacted under the far-reaching Commerce Clause and § 5 of the Fourteenth Amendment. *See E.E.O.C. v. Pacific Press Pub'g Ass'n*, 676 F.2d 1272, 1279 n.10 (9th Cir. 1982). Title IX was not, and consequently its reach is narrower.

Third, the exposition of liability under Title VII depends upon agency principles. *See Meritor*, 477 U.S. at 72, 106 S. Ct. at 2408; *Faragher*, 111 F.3d at 1534-36. Agency principles are useless in discussing liability for student-student harassment under Title IX, because students are not agents of the school board. *See generally* Restatement (Second) of Agency § 1 (1958) (defining an agency relationship as one in which the principal consents to representation by the agent and the agent consents to control by the principal). Therefore, even if employers owe to employees some sort of nondelegable duty to eliminate peer harassment in the workplace, *see generally id.* § 492 (discussing employers' duty to provide reasonably safe working conditions for their employees), schools owe to students no comparable duty. In short, Title VII jurisprudence does not control the outcome of this case.

[14] We note that neither this court nor the Supreme Court in *Franklin* fully addressed the question of whether a student can state a claim under Title IX for sexual harassment by a teacher—much less whether a student can state a claim under Title IX for sexual harassment by another student.

The defendant school board in *Franklin* successfully moved the district court to dismiss Franklin's Title IX suit on the ground that "compensatory relief is unavailable for violations of Title IX," a holding which this court affirmed. *Franklin v. Gwinnett County Pub. Schs.*, 911 F.2d 617, 618 (11th Cir. 1990). The school board apparently conceded on appeal that the plaintiff's allegations stated a claim under Title IX. *See id.* at 619.

Similarly, the school board conceded before the Supreme Court that teacher-student sexual harassment violated Title IX. *See* Brief for Respondents at 2, 7, *Franklin v. Gwinnett County Sch. Dist.*, 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992) (No. 90-918). The Supreme Court granted certiorari to consider "whether the im-

The terms of Title IX gave educational institutions notice that they must prevent their employees from themselves engaging in intentional gender discrimination. *See Franklin*, 503 U.S. at 75, 112 S. Ct. at 1037. Thus, school administrators cannot deny admission to female applicants because of their gender. *See Cannon*, 441 U.S. at 709, 99 S. Ct. at 1964. School administrators cannot discriminate against teachers on account of sex. *See North Haven Bd. of Educ.*, 456 U.S. at 530, 102 S. Ct. at 1922-23. Teachers cannot sexually harass their students. *See Franklin*, 503 U.S. at 74-75, 112 S. Ct. at 1037.

The present complaint, however, does not allege that a school employee discriminated against LaShonda in any of the foregoing ways. The complaint does not allege, for example, that Fort, Maples, Pippin, or Querry sexually harassed LaShonda. Rather, the complaint alleges that

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plied right of action under Title IX . . . supports a claim for monetary damages." *Franklin*, 503 U.S. at 62-63, 112 S. Ct. at 1031. The Court emphasized that "the question of what remedies are available under a statute that provides a private right of action is 'analytically distinct' from the issue of whether such a right exists in the first place." *Id.* at 65-66, 112 S. Ct. at 1032. In fact, the *Franklin* Court rejected the arguments of the United States as *amicus curiae* precisely because those arguments concerned the existence *vel non* of a cause of action for teacher-student sexual harassment, a question which the Court considered "irrelevant." *Id.* at 69, 112 S. Ct. at 1034.

The *Franklin* Court discussed the notice element of the Spending Clause solely to counter the school board's argument that "the normal presumption in favor of all appropriate remedies should not apply because Title IX was enacted pursuant to Congress' Spending Clause power." *Id.* at 74, 112 S. Ct. at 1037. Viewed in this light, the Supreme Court's suggestion that teacher-student sexual harassment gives rise to a cause of action under Title IX was arguably dicta. We assume that *Franklin* created a cause of action for teacher-student sexual harassment under Title IX, but we are wary of extending this assumed holding to student-student sexual harassment. In any event, the Court's discussion of this issue does not foreclose our own consideration of whether appellant has stated a claim under Title IX.

these individuals failed to take measures sufficient to prevent a *non-employee* from discriminating against LaShonda. We do not think that the Board was on notice when it accepted federal funding that it could be held liable in this situation.

B.

First, as we have noted, nothing in the language or history of Title IX suggests that Title IX imposes liability for student-student sexual harassment.[15] Second, the imposition of this form of liability would so materially affect schools' decisions whether to accept Title IX funding that it would require an express, unequivocal disclosure by Congress.[16] Adopting appellant's theory of liability, however, could give rise to a form of "whipsaw" liability, under which public schools would face lawsuits from both the alleged harasser and the alleged victim of the harassment. Moreover, reasonable public school officials could perceive the likely number of such suits to be large. Because our endorsement of appellant's theory of liability

[15] The dissent devotes a great deal of attention to whether Congress intended that Title IX create a cause of action for student-student sexual harassment. *See Post*, at *1-*7. We seriously doubt whether Congress considered this problem at all when it enacted Title IX, but, in any case, the dissent's heavy reliance on its conclusory analysis of the language and history of Title IX is largely irrelevant. The question is not whether Congress intended to create a cause of action under Title IX for student-student sexual harassment but, rather, whether Congress gave school boards notice of this form of liability. In the absence of any supporting legislative history, statutory construction of ambiguous language cannot support a finding of notice as required by the Spending Clause.

[16] Private schools that receive federal funding would also be subject to suit under appellant's theory of Title IX liability. Private school teachers and administrators, however, would not ordinarily be subject to suit under § 1983, as would their public school counterparts, because they would not ordinarily be acting under color of state law. *See* § 1983; *see generally supra*, n.2. Accordingly, we discuss individual liability only with respect to public school employees.

would alter materially the terms of the contract between Congress and recipients of federal funding, appellant fails to state a claim upon which relief can be granted.

The essence of appellant's complaint is this: once a public school student complains to her teacher that a classmate has sexually harassed her, the teacher and the school board become subject to the threat of liability in money damages under federal law if they can prevent the classmate from harassing again and fail to do so. *See, e.g., Bosley*, 904 F. Supp. at 1023 ("Once a school district becomes aware of sexual harassment, it must promptly take remedial action which is reasonably calculated to *end the harassment*.") (emphasis added). In practical terms, this means that school officials would have to isolate an alleged harasser from other students through a suspension or expulsion.

The complaint devotes little attention to what measures the Board could have taken to avoid liability. The complaint admits that Querry and Fort tried to stop G.F.'s harassment by threatening him and by separating him from LaShonda within Fort's classroom. Appellant clearly does not believe that these measures sufficed. As evidence of "deliberative indifference," the complaint also alleges that the Board failed to create a school sexual harassment policy. It seems unlikely, however, that the mere existence of such a policy would foreclose liability under appellant's theory of the case.

Apparently, the appropriateness of the Board's remedial measures depends on whether the harassment actually ends. The complaint suggests that G.F. should have been "suspended, kept away from LaShonda, or disciplined in [some] way" after Lashonda complained. The Department of Justice argues broadly that a school board must take "effective action" in response to an allegation of harassment. We take these arguments to mean the same thing: a school board must immediately isolate an alleged

harasser from other students to avoid the threat of a lawsuit under Title IX.

Physical separation of the alleged harasser from other students is the only way school boards can ensure that they cannot be held liable for future acts of harassment. If a school official simply tells the alleged harasser, "Don't do it again," and the harasser does it again, then the board becomes susceptible to the argument that it had the power to end the harassment, but failed to do so out of "deliberate indifference." If the official merely transfers the alleged harasser to another classroom, the board faces the threat of suit for any acts of harassment committed by him in the new classroom—after all, the school had notice of his dangerous propensities and did not do all it could to prevent him from harassing his new classmates. Segregating the sexes into two separate programs within the same school would violate the spirit, if not the letter, of Title IX. Therefore, in practical terms, to avoid the threat of Title IX liability under appellant's theory of the case, a school must immediately suspend or expel a student accused of sexual harassment.[17]

Appellant's standard of liability therefore creates for school boards and school officials a Hobson's choice: On the one hand, if a student complains to a school official about sexual harassment, the official must suspend or expel the alleged harasser or the board will face potential liability to the victim. Moreover, if a public school official with control over the harasser finds out about his misconduct and fails to isolate him, that official runs the risk of

[17] This is the approach, incidentally, that some school boards have already adopted. *See, e.g.*, Tamar Lewis, *Kissing Cases Highlight Schools' Fears of Liability for Sexual Harassment*, N.Y. Times, Oct. 6, 1996, at A22, A22 ("While the recent suspensions of two little boys for kissing girls were widely seen as excessive, they highlight the confusion that is sweeping schools as educators grapple with a growing fear that they may be sued for failing to intervene when one student sexually harasses another.").

personal liability under 42 U.S.C. § 1983 for depriving the victim of her Title IX rights if the harasser engages in further abuse.[18] *See Nicole M.*, 1997 WL 193919, at *13; *Oona R.-S.*, 890 F. Supp. at 1462; *see also Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 723-24 (6th Cir. 1996) (holding that the remedial scheme of Title IX does not preclude a section 1983 claim based on the same conduct).

On the other hand, if the public school official, presiding over a disciplinary hearing, suspends or expels the alleged harasser, the school board may face a lawsuit alleging that the official acted out of bias—out of fear of suit. The right to a public education under state law is a property interest protected by the Due Process Clause of the Fourteenth Amendment. *See Goss v. Lopez*, 419 U.S. 565, 574, 95 S. Ct. 729, 736, 42 L. Ed. 2d 725 (1975). Accordingly, students facing a deprivation of this right must be afforded due process.[19] *Id.* at 579, 95 S. Ct. at 738. A fair hearing in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S.

[18] If we were to rule in favor of appellant, Fort, Maples, Pippin, Querry, and Dumas would arguably be entitled to qualified immunity against § 1983 liability for their actions in this case. *See Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1452 (9th Cir. 1995). Ruling in favor of appellant, however, would deprive future, similarly situated defendants of qualified immunity, because it would clearly establish a statutory right of which a reasonable school employee would know.

[19] If Georgia provided a procedure for challenging the impartiality of the school's decisionmaker, the alleged harasser would have received all the process to which he was entitled, and he would have no claim under the Due Process Clause. *See McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (en banc). Absent such a procedure, he could bring suit in federal court under § 1983, alleging that the state failed to accord him the process he was due. Whether the alleged harasser repairs to state court or to federal court, however, the disruptive effect on school officials, teachers, and students would be the same.

133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955). The decisionmaker who presides over the hearing must be impartial.[20] *See Withrow v. Larkin*, 421 U.S. 35, 46,

[20] In his separate opinion, JUDGE CARNES insists that the requirements of the procedural component of the Due Process clause are met when a school disciplinarian affords a student faced with suspension an "informal" opportunity to explain his side of the story. *See Post*, at *1-*2. JUDGE CARNES' reasoning is correct, as far as it goes, but he focuses on one narrow subset of cases—"any suspension of up to ten days." *Post* at *1.

In *Goss*, the Supreme Court held that, "[a]t the very minimum, . . . students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing." *Id.* at 579, 95 S. Ct. at 738. The kind of notice and the formality of the hearing will depend, of course, on the nature and severity of the deprivation the student faces: for example, "due process requires, *in connection with a suspension of 10 days or less*, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.* at 581, 95 S. Ct. at 740 (emphasis added); *see also, e.g., Board of Curators v. Horowitz*, 435 U.S. 78, 86, 98 S. Ct. 948, 953, 55 L. Ed. 2d 124 (1978) (noting that a college student's dismissal for academic reasons necessitates fewer procedural protections than a dismissal for disciplinary reasons).

At the end of its opinion in *Goss*, however, the Supreme Court stated, "Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than rudimentary procedures will be required." *Id.* at 584, 95 S. Ct. at 741. The Supreme Court left open the possibility that a more formal notice and hearing would be required for disciplinary actions more serious than ten-day suspensions, and so shall we.

Furthermore, regardless of the nature of the notice and the quality of the hearing, an individual faced with the deprivation of a property interest is entitled to an impartial decisionmaker—a requirement JUDGE CARNES seems to discount. *See, e.g., Nash v. Auburn Univ.*, 812 F.2d 655, 665 (11th Cir. 1987) ("An impartial decision-maker is an essential guarantee of due process."). JUDGE CARNES admits, for example, that a public school principal would be impermissibly biased, for purposes of the Due Process Clause,

95 S. Ct. 1456, 1464, 43 L. Ed. 2d 712 (1975); *McKinney v. Pate*, 20 F.3d 1550, 1561 (11th Cir. 1994) (en banc).

As we explain above, appellant's theory of the case could impose personal liability on any public school official who learns of an allegation of harassment and fails to exercise his authority to prevent a recurrence of the harassment. Were we to adopt appellant's theory of the case, therefore, public school officials would have a financial incentive to punish alleged student harassers. A financial incentive may render a decisionmaker impermissibly biased.[21] *See Gibson v. Berryhill*, 411 U.S. 564,

if the principal "took a bribe from [a] complaining student's parents in return for suspending or expelling [an] alleged wrongdoer." *Post*, at *2. JUDGE CARNES, however, refuses to accept that a principal would be just as impermissibly biased if the principal were forced to *pay money* to a complaining student for *not* suspending or expelling an alleged wrongdoer. We fail to grasp the distinction.

[21] On page *4 of his separate opinion, JUDGE CARNES leads us through a parade of horribles which, he imagines, we have created by suggesting that appellant's theory of the case would potentially give public school officials an impermissible financial incentive to punish alleged student harassers. The dire consequences he conjures, however, will never come to pass precisely because we are not adopting appellant's theory of Title IX liability. Only if we were to adopt her theory *might* public school officials face *potential* liability under both Title IX and the procedural component of the Due Process Clause. But we do not adopt appellant's theory of liability.

With regard to non-school settings, JUDGE CARNES overstates our opinion and then criticizes us for the breadth of our holding. He chides us for suggesting that "[a]ll federal, state, or local officials called upon to decide what to do in response to one person's complaint about another would have a financial incentive to avoid a lawsuit, which would disqualify them from making a decision." *Post*, at *4. We suggest nothing of the kind.

Nevertheless, on the merits of his critique, we suppose that all officials in such situations *could face lawsuits* alleging impermissible bias—*if* none of those officials had any form of immunity from suit,

579, 93 S. Ct. 1689, 1698, 36 L. Ed. 2d 488 (1973). Therefore, the disciplinary measures required to avoid liability under Title IX could subject the school board to the threat of suit by the disciplined harasser.[22]

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which, of course, they *do* have. Stated differently, public decision-makers have immunity from suit to protect them from the sort of bias which might otherwise give rise to violations of the Due Process Clause. Judges, for example, have absolute immunity from suit because "the independent and impartial exercise of judgment vital to the judiciary might be impaired by exposure to potential damages liability." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435, 113 S. Ct. 2167, 2171, 124 L. Ed. 2d 391 (1993). Similar concerns motivate qualified immunity. *See generally Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S. Ct. 2727, 2736, 73 L. Ed. 2d 396 (1982) (reasoning that, without qualified immunity, "there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties'" (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949, 70 S. Ct. 803, 94 L. Ed. 2d 1363 (1950)) (alterations in original)). In fact, as we discuss *supra*, note 18, the individual defendants in this case would likely be entitled to qualified immunity.

In sum, we create no new procedural due process rights, as JUDGE CARNES asserts. Our opinion does not even suggest that we would *have to* create such rights if we were to uphold appellant's theory of Title IX liability. Rather, our opinion states that this form of liability is *a logical extension* of appellant's theory of the case, and Congress gave no notice to public school boards that they would be potentially undertaking this form of liability when they accepted federal funding under Title IX.

[22] All of the foregoing assumes, of course, that the allegations of harassment are true. While we hesitate to assume that any allegations of student-student sexual harassment are false, we do not doubt that school students will be tempted into mischief by the prospect of swift punishment against any classmate whom they accuse of sexual harassment.

Moreover, public school officials would find such false accusations difficult to combat. Under Title VII standards of liability, which the appellant, the United States, and the dissent seem anxious to adopt, an employer may be sued for retaliating against an employee who complains about sexual harassment. *See generally* 42 U.S.C. § 2000e-3(a) (1994) ("It shall be an unlawful employment practice

In addition to the threat of this whipsaw liability, schools would face the virtual certainty of extensive litigation costs. These costs would include not only lawyers fees, but also the burdens associated with the disruption of the educational process. The litigation we describe would inevitably involve teachers, students, and administrators in time-consuming discovery and trial preparation. Schools could reasonably expect to receive from Congress explicit notice of these consequences. They did not.[23]

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for an employer . . . to discriminate against any individual . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."). Thus, under the logical implications of appellants theory of Title IX liability, a school board could face a lawsuit from the complaining student if it disciplines her for bringing a vexatious complaint against a classmate. As discussed in the text, the threat of lawsuits under § 1983 against the public school officials themselves would soon follow.

[23] Appellant and the Department of Justice draw our attention to the regulatory activities of the Office of Civil Rights of the United States Department of Justice ("OCR"). The OCR issued interim guidelines concerning schoolhouse sexual harassment on August 16, 1996. *See* Sexual Harassment Guidance: Peer Sexual Harassment, 61 Fed. Reg. 42,728 (1996). These guidelines issued after the alleged harassment of LaShonda. Moreover, at the time of the alleged harassment, the code of federal regulations did not discuss student-student sexual harassment. *See* 34 C.F.R. § 106.31 (1992). Therefore, OCR's regulations did not put the Board on official notice of its potential liability for G.F.'s harassment of LaShonda.

Nevertheless, appellant and the Department of Justice urge that we defer to the OCR's current interpretation of Title IX for purposes of this case. The OCR issued final policy guidance on student sexual harassment on March 13, 1997. *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (1997). In this publication, the OCR constructs a labyrinth of factors and caveats which simply reinforces our conclusion that the Board was not on notice that it could be held liable in the present situation.

According to the March 13 guidance, schools are liable for failing to eliminate

School boards could reasonably believe that this form of whipsaw liability would arise in a substantial number of cases. According to a 1993 survey of American public

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> sexually harassing conduct (which can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature) . . . by another student . . . that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment.

Id. at 12,038.

Because the meaning of this language may not be obvious to school officials, the March 13 guidance lists several factors which should be taken into account when a student is sent to the office for sexually harassing another student. Among other factors and subfactors, the school official should consider the "welcomeness" of the conduct, the age of the harasser, the age of the victim, the relationship between the parties, the degree to which the conduct was sexual in nature, the duration of the conduct, the frequency of the conduct involved, the degree to which the conduct affected the victim's education, the pervasiveness of the conduct at the school, the location of the incident, the occurrence of any similar incidents at the school, the occurrence of any incidents of gender-based but non-sexual harassment, the size of the school, and the number of individuals involved in the incident.

The school official should keep in mind that "in some circumstances, nonsexual conduct may take on sexual connotations and may rise to the level of sexual harassment." *Id.* at 12,039. He should also remember that "a hostile environment may exist even if there is no tangible injury to the student," and even if the complaining student was not the target of the harassment. *Id.* at 12,041. In addition, the official must recall that a single act of student-student harassment can create a hostile environment. *See id.* Finally, the school official must keep in mind that, if he does not kick the alleged harasser out of school, and the harasser misbehaves again, the official could be personally liable if a jury concludes, after the fact, that he could have done more to prevent the harasser from harming his classmates.

The foregoing analysis assumes, of course, that the school official actually knew of the complaint against the harasser and summoned him to the front office. According to the OCR, however, the official may be liable even if he did not know about the harassment: the offical may cause the school to violate Title IX if he

school students, 65% of students in grades eight to eleven were victims of student-student sexual harassment. *See* American Ass'n of Univ. Women Educ. Found., Hostile Hallways: The AAUW Survey on Sexual Harassment in American Schools 11 (1993) [hereinafter AAUW Survey]. Extrapolating from Department of Education statistics, roughly 7,784,000 public school students in grades eight through eleven would consider themselves to be victims of student-student sexual harassment.[24] Furthermore, 59% of students (including 52% of female students) in grades eight to eleven responded that they had sexually harassed other students. *See* AAUW Survey, *supra*, at 11-12. Thus, if this survey is accurate, around 7,177,000 public school students in grades eight to eleven, male and female, would admit to sexually harassing other students.

We do not adopt these statistics as our definitive guide to the extent of sexual harassment in America's public schools. We draw attention to these figures only to illustrate what school boards would have to consider in deciding whether to accept federal funding under Title IX. The AAUW Survey could suggest to reasonable public school officials that a substantial number of lawsuits will be brought under appellant's theory of Title IX liability.

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failed to exercise "due care" in discovering the misconduct. *See id.* at 12,042. The foregoing does not address the lawsuit that the harasser's parents will file when the school official summarily suspends him. According to appellant and the Department of Justice, the Board received clear notice of this form of liability when it accepted federal funding under Title IX. We think not.

[24] To calculate the number of purported student victims of harassment in the nation, we multiplied the percentage of victims provided by the AAUW Survey by the total number of students enrolled in public schools in grades eight to eleven during the 1992-1993 school year. We obtained the enrollment statistics from the world-wide-web home page of the Department of Education. *See, e.g.*, U.S. Dep't of Educ., *Enrollment in Public Elementary and Secondary Schools by Grade: Fall 1980 to Fall 1994* (last modified Mar. 1996) <http://nces01.ed.gov/nces/pubs/D96/D96T042.html> [hereinafter *U.S. Education*]. We used the same process to calculate the total number of professed student harassers in the nation.

Therefore, imposition of this form of liability would materially affect their decision whether to accept federal educational funding.[25]

An enactment under the Spending Clause must read like a prospectus. Just as a prospectus must unambiguously disclose all material facts to a would-be purchaser, an enactment under the Spending Clause must unambiguously disclose to would-be recipients all facts material to their decision to accept Title IX funding. The threat of whipsaw liability in a substantial number of cases would materially affect a Title IX recipient's decision to accept federal funding, yet Congress did not provide unambiguous notice of this type of liability in the language or history of that statute. We will not alter retrospectively, the terms of the agreement between Congress and recipients of Title IX funding.[26]

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[25] In JUDGE CARNES' separate opinion, he characterizes our use of statistics as an attempt "to establish that student-student sexual harassment is such a widespread and extensive problem that a different holding of this case would impose massive liability upon school officials and boards." *Post*, at *8. As we indicate in the text, this is not our objective at all. We cite these statistics because *school boards* may consider them to be a valid indicator of the amount of litigation that they will face. If a lawyer for the Monroe County School Board were trying to advise the Board about the potential costs and benefits of accepting federal funding, would it not matter to that lawyer whether accepting federal funds would give rise to a few lawsuits or thousands of lawsuits?

JUDGE CARNES suggests that the AAUW Survey overstates the actual number of lawsuits that could be brought under appellant's theory of Title IX liability. We agree that the survey did not use the same definition of student-student sexual harassment as our case law dictates, but statistical purity would arguably require a jury verdict agreeing with the allegations of each student who claimed to have been harassed. In any event, there are plenty of reasons for public school officials to overlook the statistical flaws in the AAUW Survey when it is their own pocketbooks—not those of federal judges—that are at stake.

[26] As noted above, the purpose of enactments under the Spending Clause is "to further [Congress's] broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Fullilove v. Klutznick*, 448 U.S. 448, 474, 100 S. Ct. 2758, 2772, 65 L. Ed. 2d 902 (1980) (opinion of Burger, C.J.). Congress uses the spending power "to induce governments and private parties to cooperate voluntarily with federal policy." *Id.* If no one chooses to receive federal funds under a proposed legislative program, Congress's intent would be frustrated and its policy objectives would remain unfulfilled. *See Rowinsky*, 80 F.3d at 1013.

Prospective recipients will decline federal funding and current recipients will withdraw from federal programs if the cost of legislative conditions exceeds the amount of the disbursement. Federal funding represents only 7% of all revenues for public elementary and secondary schools in the United States. During the 1992-1993 school year, for example, American schools received $17,261,252,000 from the federal government out of a total budget of $247,626,168,000. *See U.S. Education, supra*, at <D96T157.html>.

School authorities must weigh the benefit of this relatively small amount of funding against not only the threat of substantial institutional and individual liability—as suggested by the AAUW Survey—but also the opportunity costs of devoting to litigation hours that might otherwise be spent running their schools. Because harassment of the sort experienced by LaShonda is rarely observed directly by school officials, Title IX claims of the sort envisioned by appellant would require the time-consuming testimony of numerous student witnesses. Imposing the liability of the sort envisioned by appellant could induce school boards to simply reject federal funding —in contravention of the will of Congress. *See Rowinsky*, 80 F.3d at 1013.

IV.

We condemn the harm that has befallen LaShonda, a harm for which Georgia tort law may indeed provide redress. Appellant's present complaint, however, fails to state a claim under Title IX because Congress gave no clear notice to schools and teachers that they, rather than society as a whole, would accept responsibility for remedying student-student sexual harassment when they chose to accept federal financial assistance under Title IX. Accordingly, the judgment of the district court is AFFIRMED.

Circuit Judges EDMONDSON, COX, BIRCH, DUBINA, BLACK and CARNES concur in the court's opinion with the exception of Parts III.B and III.C.

BLACK, Circuit Judge, concurring:

I concur in the Court's judgment and, with the exception of Parts IIIB and IIIC, join in its opinion. I write separately only to respond to the dissent's contention that the Court's disposition contravenes the "plain meaning" of Title IX. It is axiomatic that the statutory language is the starting point for interpreting the meaning of a statute. *Ardestani v. INS*, 502 U.S. 129, 135, 112 S. Ct. 515, 519 (1991); *United States v. McLemore*, 28 F.3d 1160, 1162 (11th Cir. 1994). If the statutory language is unambiguous, the courts must enforce the statute as written absent a clearly-expressed legislative intent to the contrary. *United States v. Turkette*, 452 U.S. 576, 580, 101 S. Ct. 2524, 2527 (1981); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056 (1980); *RJR Nabisco, Inc. v. United States*, 955 F.2d 1457, 1460 (11th Cir. 1992). On the other hand, where the statutory language is ambiguous, then a court may look to legislative history in an effort to discern the intent of Congress. *See Royal Caribbean Cruises, Ltd. v. United States*, 108 F.3d 290, 293 (11th Cir. 1997); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1498 (11th Cir. 1991).

The present case requires us to decide whether Title IX prescribes liability for the failure of a school board to prevent a student from discriminating against a classmate on the basis of sex. The text of Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (1994). As the dissent recognizes, "[t]he absolute prohibition contained in the text is framed solely in terms of who is protected." The statute simply does not specify what relationship, if any, the perpetrator of an underlying act of sexual harassment must have to the federally-funded educational institution to trigger Title IX liability.

The dissent nevertheless divines from congressional silence an unambiguous endorsement of the proposition that "[t]he identity of the perpetrator is simply irrelevant." Under this conception of Title IX, liability presumably would attach anytime the school board failed to prevent anyone—student, teacher, parent, neighborhood resident—from discriminating on the basis of sex to the extent that such action inhibited a student from realizing the full benefits of federally-funded education. In my view, the text of Title IX permits at least equally plausible constructions that would circumscribe liability more narrowly. Specifically, the text of Title IX may be interpreted to impose liability only when the school board or one of its agents bears direct responsibility for discriminating on the basis of sex, as would be the case had any of Lashonda Davis' teachers participated in the sexual harassment she was forced to endure. The absence of any reliable textual indication regarding which of these constructions Congress envisioned invites consideration of legislative history and the congressional power from which the statute emanates in an effort to discover congressional intent. The Court's approach thus represents an entirely appropriate effort to effectuate congressional will in the absence of unambiguous textual guidance, not, as the dissent appears to suggest, strident judicial refusal to enforce clearly expressed legislative intent.

CARNES, Circuit Judge, concurring specially:

I concur in the holding that Title IX does not create a cause of action against public school boards or officials for failure to prevent or remedy student-student sexual harassment. In my view, that holding is correct for essentially those reasons stated in Parts I, II, III A, and IV of Judge Tjoflat's opinion, and I join those parts of it, which constitute the opinion of the Court. However, for the reasons explained below, I do not join Parts III B and C of Judge Tjoflat's opinion, which express only his own views.[1]

I.

The "Hobson's choice" or "whipsaw liability' discussion in Part III B of the opinion is based upon a fundamentally erroneous premise. If school officials could be sued for failing to prevent or remedy student-student sexual harassment, that part of the opinion says, the potential liability would amount to a financial incentive to punish the accused harassers, which would or could render school officials impermissibly biased and require recusal. Of course, a student does have a property interest in a public education which is protected by the Due Process Clause of the Fourteenth Amendment.[2] And, due process does

[1] Parts I, II, III A, and IV of Judge Tjoflat's opinion constitute the opinion of the Court, because those parts are joined by six of the ten judges participating in this decision. By contrast, none of the other nine judges participating in this decision have joined Parts III B and C of that opinion.

[2] The nature and extent of the protection afforded the property interest in a public education, the due process requirements attendant to its loss, depends upon the severity of the loss. In *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729 (1975), the Supreme Court held that, with any suspension of up to ten days, all the Due Process Clause requires is for the student to "be given oral or written notice of the charges against him and if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." 419 U.S. at 581, 95 S. Ct. at 740; *accord*

require that a decision depriving the student of that property interest be made by someone who does not have a pecuniary interest in having the student suspended or expelled. To take an extreme example, regardless of any other process afforded, due process would be violated if a principal took a bribe from the complaining student's parents in return for suspending or expelling the alleged wrongdoer. But it is an entirely different matter to suggest, as Part III B of the opinion does, that a school official's *potential* liability to the complaining student *if* that official fails to take legally *required* action amounts to a "financial incentive" which renders that official "impermissibly biased" and requires recusal from deciding what action, if any, is required in the circumstances. As authority for that novel proposition, the opinion cites only *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S. Ct. 1689, 1698 (1973). The *Gibson* decision provides no support for the proposition, because it does not hold, or even imply, that an official's potential liability for failing to properly exercise decisionmaking authority constitutes

Arnold v. Board of Educ., 880 F.2d 305, 318 (11th Cir. 1989). The Supreme Court said in *Goss* that "[i]n the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred," and "[w]e hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is.' 419 U.S. at 582, 95 S. Ct. at 740. The Court has since explained that all *Goss* requires before a suspension is an "informal give and take" in order to provide the student "the opportunity to characterize his conduct and put it in what he deems the proper context." *Board of Curators v. Horowitz*, 435 U.S. 78, 86, 98 S. Ct. 948, 953 (1978) (quoting *Goss*, 419 U.S. at 584, 95 S. Ct. at 741); *accord, e.g., C.B. v. Driscoll*, 82 F.3d 383, 386 (11th Cir. 1996) ("The dictates of *Goss* are clear and extremely limited."). These "rudimentary precautions," to use the description from *Goss* itself, 419 U.S. at 581, 95 S. Ct. at 740, are a far cry from a due process tribunal hearing attendant to some property interest deprivations.

a "financial incentive" which renders the official "impermissibly biased."

Gibson involved a state optometry board composed exclusively of private practitioners who were in competition with corporate employee optometrists. Those board members had a substantial pecuniary interest in excluding from the market corporate employee optometrists, who accounted for nearly half of all the practicing optometrists in the state. The Supreme Court affirmed the district court's holding that the private practitioner's pecuniary interest in eliminating competition disqualified them from deciding whether the practice of optometry by corporate employees as such constituted unprofessional conduct justifying license revocation. *See* 411 U.S. at 578-79, 93 S. Ct. at 1698. That holding does not support the proposition that any time an official can be sued for failing to respond properly to a complaint that official is disqualified from making a decision about how to respond to the complaint.

If that suggested proposition were the law of this circuit—and thankfully it is not—no school official could ever discipline a student for any alleged misconduct as a result of another student's complaint without violating the due process rights of the disciplined student. The reason such an imposition of discipline would violate due process is that such an official would always have a financial incentive, under that view, to believe the complaint in order to avoid a lawsuit filed by the complaint. The ramifications of such a rule would extend to discipline for any type of misconduct, because there is no principled basis on which a distinction can be drawn between discipline following a complaint about sexual harassment and that following a complaint about any other type of misconduct.

Nor is there any principled basis by which such an automatic disqualification rule could be confined to school settings. It would also apply outside the Title IX context; for example, in jail and prison settings. If one prisoner

complains to a jailer or warden about what some other prisoner has done to him, under Judge Tjoflat's view that official will have a financial interest in avoiding a lawsuit from the complaining prisoner (alleging deliberate indifference), and such an interest disqualifies the official from making any disciplinary decision about the complaint. So, not only would the disqualification rule be automatic, it also would be universal. No one would be able to decide any disciplinary matters in schools, in prisons, or in any other setting within the purview of the Due Process Clause. All federal, state, or local officials called upon to decide what to do in response to one person's complaint about another would have a financial incentive to avoid a lawsuit, which would disqualify them from making a decision. That cannot be the law, and it is not the law.

Judge Tjoflat's response to having these flaws in his reasoning pointed out is contained in footnote 21 of his opinion, which will reward close scrutiny. First, that footnote assures us that we should not worry about the far-reaching ramifications of the suggestion that potential liability equals disqualifying bias, because this Court is holding that school officials have no liability under Title IX for student-student sexual harassment. Apparently forgotten is the assurance, in Part IV of the opinion, that "Georgia tort law may indeed provide redress" for the very same conduct. If a school official's potential liability for not acting properly is a disqualifying financial interest, it matters not whether that potential liability is posed by Title IX or by state tort law. The opinion does not, and logically cannot, suggest otherwise. Instead, it adopts a head-in-the-sand approach which ignores everything but Title IX, as though that were the only potential source of liability for school officials who are called upon to decide what to do about student-student sexual harassment complaints.

With its head comfortably in the sand, the opinion also ignores entirely the obvious implications of its propo-

sition for student-student disputes involving allegations of misbehavior other than sexual harassment. Part of the quotidian business of teachers and principals is resolving disputes in which one student alleges another has threatened, hit, stolen from, or otherwise mistreated him or her. Some of those disputes pose potential liability for the teacher or principal who fails to act. For example, a school official who fails to take appropriate action to protect a student from a threatened thrashing at the hands of another student may have to answer in a state court tort action. Under the reasoning contained in Part III B of the opinion, that potential liability would prevent any school official from deciding what to do about such a complaint, because that official's potential liability to the complaining student would amount to a disqualifying financial bias. A careful reading of the opinion reveals that it fails to explain why that result would not necessarily follow from its suggested reasoning.

As to settings outside the school context, footnote 21 of the opinion offers two responses to this criticism. First, it simply denies—"We suggest nothing of the kind"—that its proposition about potential liability equaling disqualifying bias would have any application outside the schoolhouse. That *ipse dixit* assertion has as little reasoning behind it as the proposition itself. The opinion fails to offer any reason why the automatic bias theory it suggests would not apply in non-school contexts, because there is no reason. The right to an unbiased decision maker is a rudiment of due process, which is as applicable outside schools as within them.

Apparently realizing that the *ipse dixit* approach will not shield the naked illogic of its position from view, the opinion attempts to camoflauge the problem with talk of immunity. "Don't worry," we are told, officials in non-school settings have "immunity from suit" which removes any potential liability for failing to decide for the complaining party, and any financial incentive to favor that

party disappears along with the potential liability. The thinnest stripe of the attempted camouflage is the opinion's reference to judicial immunity. We are not talking about judges. We are talking about the myriad of federal, state, and local non-judicial officials who are regularly called upon to decide what to do in response to one person's complaint about another. Jailers, wardens, and other corrections officials are but a few examples. These people are not judges. They do not enjoy judicial immunity.

Even so, the opinion says, there is qualified immunity. There are three problems with the assertion that the availability of qualified immunity distinguishes non-school officials from school officials by removing any threat of lawsuit by a complaining party dissatisfied with an official's resolution of a complaint outside the school setting. First, qualified immunity is not absolute. Second, qualified immunity does not shield officials from liability grounded on state law. Third, and most obviously, the doctrine of qualified immunity is the same for school officials as for non-school officials. If that doctrine shields non-school officials from threat of lawsuit sufficiently to remove any disqualifying financial incentive to decide for a complainant, it does exactly the same for school officials. Thus, with its talk of qualified immunity, Part III B of the opinion has succeeded in reaching around and biting itself in the back. If what the plurality opinion says about the due process implications of qualified immunity is true, then the opinion has disproven the very proposition it is seeking to defend.

II.

Part III C of Judge Tjoflat's opinion attempts to establish that student-student sexual harassment is such a widespread and extensive problem that a different holding in this case would impose massive liability upon school officials and boards. In its words, agreeing with appellant's theory of liability would give rise to "thousands of lawsuits." Tjoflat Opinion at n.25. The factual premise of

that reasoning is based entirely upon one survey report. *See* American Ass'n of Univ. Women Educ. Found., *Hostile Hallways: The AAUW Survey on Sexual Harassment in American Schools* (1993) (hereinafter *"AAUW Survey Report"*).

The *AAUW Survey Report* was not the subject of an evidentiary hearing in the district court, nor has it been examined in a hearing in any other court insofar as we know. Neither party to this appeal even mentioned the survey in the briefs; it was discussed only in one amicus brief. In general, we should be reluctant to incorporate into our reasoning the results of a survey that has not been examined critically or tested in a trial or evidentiary hearing, the time-honored and proven methods our system of justice uses to determine material facts.

Beyond the general problems with using surveys in judicial decision making, there are specific reasons why employment of this particular survey for the purpose Judge Tjoflat uses it in Part III C of his opinion is ill-advised. That purpose, of course, is to show student-student sexual harassment is so rampant that if a cause of action existed for it the resulting flood of litigation would inundate our public school systems, or at least school officials would have a basis for fearing that result—the basis being the survey.

The first reason we ought to be especially cautious about such a use of this particular survey is that its purported findings are, in the words of the sponsors of the survey: "startling," and for some "the results will be surprising and shocking." *Id.* at 2. The reason for such descriptions is that it is difficult to believe that 65 percent of all eighth through eleventh grade students have been sexually harassed by other students, and that half of all female and male students in those grades are self-professed sexual harassers. We ought to be reluctant to accept as fact, or assume that school officials would accept as fact, such "surprising and shocking" statistics based upon a

single survey of only a tiny fraction of one percent of the total number of students in four grades.

Even a cursory look at the survey report gives more reason to be dubious about the opinion's use of the report. The survey asked students how often "[d]uring your whole school life" has anyone "when you did not want them to" done any of the following things, and it then provided a list of behavior the survey defined as sexual harassment. *See id.* at 5. Some behavior on that list clearly constitutes sexually harassing behavior of the most serious type. But included in the list is other behavior that is less serious and far less likely to lead to complaints and litigation, which is what Judge Tjoflat uses the survey to predict (or posits that school boards will use it to predict). For example, included in the survey's definitional list of sexual harassment was any instance in which another student: "Made sexual comments, jokes, gestures, or looks;" or "[s]pread sexual rumors about you;" or "[s]aid you were gay or lesbian." *Id.* at 5. Remember that a single unwelcome instance of such activity, during the student's entire school life, renders that student a victim of sexual harassment for purposes of the survey.

A student who has ever been looked at by another student in an unwelcome way perceived to be sexual is defined by the survey to be a sexual harassment victim. Any student ever called gay or lesbian is also a sexual harassment victim in the survey's view. Any time unwelcome rumors are spread about a student having any type of sexual activity (presumably including kissing) with another student, those students are sexual harassment victims as the survey defines it. To take one final example of how the total incidence of "sexual harassment" reported overstates legally actionable incidents of sexual harassment, consider that the survey definition includes incidents in which someone "[f]lashed or 'mooned' you. *Id.* At 5. Suppose that a student at a school function (which the survey defines to include school sporting events and field

trips) "moons" all the students in attendance, or all those from a rival school. A single episode of that misbehavior—which is not nice and certainly should not occur, but has been known to happen—could make sexual harassment victims, as the survey defines the term, out of scores or even hundreds of students. Yet, such an incident is extremely unlikely to result in litigation against the school.

It is also worthy of note that the survey asked students whether the behavior it defined as sexual harassment had happened to them "[d]uring your whole school life." *Id.* at 5. Therefore, the 65 percent figure reflects those who have experienced that behavior at any time during any school year of their life. It does not purport to be annual data.

Finally, Part III C of the opinion fails to point out that the survey also asked the students if any of them who had been sexually harassed, as that term was defined in the survey, had told a teacher about the experience. Only 7 percent of the sixty-five percent had. *See AAUW Survey Report* at 14. Whatever the reasons for not reporting such behavior to a teacher, the failure to do so in all but the rarest instances has obvious implications for the existence of causes of action against schools or the likelihood of actual litigation.

The opinion attempts to deflect criticism about misuse of the survey by suggesting that while the opinion's author does not necessarily think that the survey is a valid indicator of how much student-student sexual harassment occurs, school boards might think that the survey is and reject federal funding as a result of it. With all due respect, there is no reason to believe that school boards would be less likely than federal judges to see the flaws in such an interpretation of the survey. School boards know more about what is going on in their schools than we do, and they can be expected to critically examine any survey before using it as a basis for turning down federal funding for their schools. Rather than hiding behind

speculation about how school board officials might interpret the survey, the opinion ought to face up to the flaws in its suggested use of the survey.

Upon its release, the sponsors of the survey stated that they were "confident that the results of this survey will become a focal point on the agendas of policy makers, educators, and others concerned with the education of America's children." *Id.* at 21. Their confidence about how the survey would be used might be undermined by Part III C of Judge Tjoflat's opinion. More importantly, we are not policymakers. We do not have agendas. We ought to leave this survey to those who do.

III.

The parts of Judge Tjoflat's opinion that neither I nor any other member of the Court except its author joins, Parts III B and C, are not necessary to the opinion's essential reasoning or to the holding of this case. Neither the language of Title IX nor its legislative history indicates that Congress intended to saddle school boards and officials with liability for student-student sexual harassment, and school boards had no notice that such liability would result from accepting Title IX funds. For those reasons, I do join the holding of the Court and Parts I, II, III A, and IV of Judge Tjoflat's opinion.

BARKETT, Circuit Judge, dissenting, in which HATCHETT, Chief Judge, KRAVITCH and HENDERSON, Senior Circuit Judges, join.

In this case it is alleged that a fifth-grade student, Lashonda Davis, was sexually harassed for over six months at school by another student, culminating in a sexual battery for which her harasser pled guilty in state court. It is also alleged that school officials were completely aware of the escalating gravity of the situation and took no meaningful action to deter it. The majority holds that no matter how egregious—or even criminal—the harassing discriminatory conduct may be, and no matter how cognizant of it supervisors may become—a teacher could observe it directly and regularly—there would be no obligation to take any action to prevent it under the very law which was passed to eliminate sexual discrimination in our public schools. To reach this conclusion the majority ignores the plain meaning of Title IX as well as its spirit and purpose. I suggest that under appropriate statutory analysis as well as Supreme Court precedent, Davis has stated a cause of action.

The first principle in statutory analysis requires that a statute be accorded the plain meaning of its text. It is well established that "[c]ourts must assume that Congress intended the ordinary meaning of the words it used, and absent a clearly expressed legislative intent to the contrary, that ianguage is generally dispositive." *Gonzalez v. McNary*, 980 F.2d 1418, 1420 (11th Cir. 1993) (internal citation omitted). The Supreme Court has emphasized that "only the most extraordinary showing of contrary intentions from [legislative history] would justify a limitation on the 'plain meaning' of the statutory language." *Garcia v. United States*, 469 U.S. 70, 75 (1984). The text of Title IX provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

20 U.S.C. § 1681(a). There is no ambiguity in this language. It is undisputed that the Monroe County School System is a recipient of federal financial assistance. It is also well established that hostile environment sexual harassment is a form of intentional discriminaiton which exposes one sex to disadvantageous terms or conditions to which members of the other sex are not exposed. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986); *see also Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992) (hostile environment for student created by teacher is a form of discrimination cognizable under Title IX). The absolute prohibition contained in the text is framed solely in terms of who is protected. The identity of the perpetrator is simply irrelevant under the language: "No person . . . shall . . . be excluded from participation . . . , be denied the benefits of, or be subjected to discrimination . . . ." Thus, under the statute's plain language, liability hinges upon whether the grant recipient maintained an educational environment that excluded any person from participating, denied them benefits, or subjected them to discrimination.

Should one need to interpret the statute, it must initially be noted that Title IX was designed to protect individuals from sex discrimination by denying federal financial aid to those educational institutions that bear responsibility for sexually discriminatory practices. *Cannon v. University of Chicago*, 441 U.S. 677, 704 & n.36 (1979) (citing 117 Cong. Rec. 39252 (1971)). "It is a strong and comprehensive measure which . . . is needed if we are to provide women with solid legal protection as they seek education and training for later careers . . . ." *Id.* at 704 n.36 (quoting Sen. Birch Bayh, 118 Cong. Rec. 5806-07 (1972)). Thus, in interpreting Title IX, "[t]here is no doubt that if we are to give [it] the scope that its origins dictate, we must accord it a sweep as broad as its lan-

guage." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (internal quotation marks omitted).

Moreover, the Office of Civil Rights of the Department of Education, the federal agency responsible for enforcement of Title IX, interprets the statutory language to impose liability on school officials for permitting an educational environment of severe, persistent, or pervasive peer sexual harassment when they know or should know about it, and fail to take immediate and appropriate corrective action to remedy it. *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties, 62 Fed. Reg. 12,034, at 12,039-41 (1997). The OCR's final policy guidance explains that:

> a school's failure to respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX. . . . Thus, Title IX does not make a school responsible for the actions of harassing students, but rather for its *own* discrimination in failing to remedy it once the school has notice.

Id. at 12,039-40 (emphasis added).[1]

[1] It is worth noting that the OCR's interpretation of Title IX as holding schools liable for permitting peer sexual harassment is consistent with its interpretation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1964), as holding schools liable for allowing peer racial harassment. This is significant because the Supreme Court has noted that "Title IX was patterned after Title VI." *Cannon*, 441 U.S. at 694. As the majority points out, the language of the two statutes is virtually identical, and the Supreme Court has held that they should be interpreted in the same way. *See* Majority Op. at 21-22 (citing *Cannon*, 441 U.S. at 696). The OCR issued An Investigative Guidance on Racial Incidents and Harassment Against Students at Educational Institutions in 1994 providing, "[T]he existence of a racially hostile environment that is created, encouraged, accepted, tolerated or left uncorrected by a recipient also constitutes different treatment on the basis of race in violation of Title VI." *See* 59 Fed. Reg. 11,448, at 11,448 (1994). Furthermore, the OCR has stated that the obligation of school districts with notice to remedy racially hostile environments applies "regardless of the identity of the person(s) committing the harassment—a teacher, student, the grounds crew, a cafeteria worker, neighborhood teenagers, a visiting baseball team, a guest speaker, parents or others." *Id.* at 11,450. As explained by the OCR:

> Under this analysis, an alleged harasser need not be an agent or employee of the recipient, because this theory of liability under Title VI is premised on a recipient's general duty to provide a nondiscriminatory educational environment.

Id. at 11,449.

Additionally, it is interesting to note that shortly after the enactment of Title VI, the former Fifth Circuit recognized that school officials must take steps within their power to prevent racial harassment among students. In *United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385 (5th Cir. 1967) (en banc), which is binding precedent in this circuit, *see Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the court of appeals entered a model desegregation decree which complied with "the letter and spirit of the Civil Rights Act of 1964", *Jefferson County*, 380 F.2d at 390. The decree provided in relevant part:

> Within their authority school officials are responsible for the protection of persons exercising rights under or otherwise affected by this decree. They shall, without delay, take appropriate action with regard to any student or staff member who interferes with the successful operation of the plan. Such interference shall include harassment, intimidation, threats, hostile words or acts, and similar behavior.

Id. at 392.

Notwithstanding the administrative interpretation of the statute, as well as it plain meaning, the majority concludes that Congress did not intend to create a cause of action under Title IX for student-on-student sexual harassment based largely on an analysis of legislative history. The majority emphasizes that "throughout this long legislative history, the drafters of Title IX never discussed student-student sexual harassment . . . ." *See* Majority Op. at 18. Assuming this to be true, the mere fact that student-on-student sexual harassment may not have been specifically

mentioned in the Congressional debates does not mean that it was not encompassed within Congress's broad intent of preventing students from being "subjected to discrimination" in federally funded educational programs. The majority suggests that it is clear that Congress was not concerned with student-on-student sexual harassment because the legislative history focused primarily on the issues of discrimination in "admission[s]," "available services or studies," and "employment within an institution," none of which were pertinent to the claim raised in this case. *See* Majority Op. at 13-14, 17. However, under this narrow view, even the cause of action under Title IX for teacher-on-student sexual harassment recognized by the Supreme Court in *Franklin,* 503 U.S. at 60, would not be supported by the majority's view of legislative history. In *Franklin* the Court considered a high-school student's Title IX suit alleging that a teacher had sexually harassed and assaulted her and that school officials, who had knowledge of the misconduct, had failed to intervene. *Id.* at 63-64. Surely the majority would not suggest that the cause of action that the Supreme Court recognized in *Franklin* does not exist simply because it was not specifically mentioned in the legislative history. Moreover, the majority's interpretation of the statute based on legislative history would suggest that by using the unqualified words "discrimination under any education program" Congress only intended to cover the narrow areas of admissions, services, and employment. This contravenes both common sense and the plain meaning of the words of the statute.

Furthermore, the majority contends that Title IX may not be construed as authorizing a cause of action for a school board's failure to remedy student-on-student sexual harassment because such an interpretation would conflict with the notice of liability requirement of the Spending Clause, which is the constitutional provision under which Title IX was ostensibly enacted.[2] *See* Majority Op. at 22,

[2] In *Franklin*, the Supreme Court assumed, without deciding, that Title IX was enacted pursuant to the Spending Clause. *Franklin*, 503 U.S. at 75 & n.8. It is also arguable that the provision was enacted pursuant to § 5 of the Fourteenth Amendment. For purposes of this discussion, I will assume, like the majority, that the authorizing provision was the Spending Clause.

25-26 (citing *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1, 17 (1981)). However, it is clear that the school board would have sufficient notice of liability based on the plain meaning of the statute, which unequivocally imposes liability on grant recipients for maintaining an educational environment in which students are subjected to discrimination. Further, sufficient notice was provided to satisfy the Spending Clause prerequisite for a damages action under Title IX as set forth in *Franklin,* 503 U.S. at 74-75. In *Franklin* the Court explained that the notice requirement for damages actions under the Spending Clause in Title IX cases is satisfied where the alleged violation was intentional. *Id.* The Court found that since sexual harassment constitutes intentional discrimination in violation of Title IX, the Spending Clause does not prohibit a cause of action for teacher-on-student sexual harassment under Title IX. *Id.* Similarly, in this case the alleged violation of Title IX was intentional because the school board knowingly permitted a student to be subjected to a hostile environment of sexual harassment. *See, e.g., Doe v. Petaluma City Sch. Dist.,* 949 F.Supp. 1415, 1422, 1427 (N.D.Cal. 1996) (holding that hostile environment sexual harassment constitutes "intentional discrimination," and that school are liable under Title IX when they know or should know about student-on-student sexual harassment and fail to take prompt remedial action); *Bruneau v. South Kortright Central Sch. Dist.,* 935 F.Supp. 162, 172 (N.D.N.Y. 1996) (recognizing that a school's failure to take corrective action in response to hostile environment created by peers despite actual notice of harassment subjects it to liability for intentional discrimination, and therefore to damages under Title IX), *Burrow v. Postville Community Sch. Dist.,* 929 F.Supp. 1193, 1205 (N.D. Iowa

1996) (holding that intentional discrimination may be inferred from "the totality of relevant evidence, including evidence of the school's failure to prevent or stop the sexual harassment despite actual knowledge of the sexually harassing behavior of students over whom the school exercised some degree of control"); *Oona R.-S. v. Santa Rosa City Schs.*, 890 F.Supp. 1452, 1464, 1469 (N.D. Cal. 1995) (explaining that discriminatory intent can be found in "the toleration of harassing behavior of male students, or the failure to take adequate steps to deter or punish peer harassment"); *see also Canutillo Independent School Dist. v. Leija*, 101 F.3d 393, 406 (5th Cir. 1996), *cert. denied*, 1991 WL 195227 (1997) (noting that "when the Supreme Court referred to 'intentional discrimination' in *Franklin*, it was referring to any form of discrimination other than disparate impact discrimination.").

Finding that Title IX authorizes a cause of action for student-on-student sexual harassment, we should then follow the lead of other courts, including the Supreme Court, in turning to Title VII principles to delineate the scope of the school board's duty and identify the elements of a cause of action under Title IX. In relevant part, Title VII requires an employer to take steps to assure that the working environment of its employees is free from sexual harassment [3] that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Meritor*, 477 U.S. at 67 (internal quotation marks and brackets omitted).

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[3] Sexual harassment involves unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. 29 C.F.R. § 1604.11(a) (1991). Such harassment constitutes actionable sex discrimination in the workplace either as "quid pro quo" sexual harassment, which conditions employment benefits upon sexual favors, or as "hostile environment" sexual harassment, which creates an intimidating, hostile or offensive working environment that unreasonably interferes with an individual's work performance. *See Meritor*, 477 U.S. at 62, 65.

It is appropriate to turn to Title VII because the Supreme Court has explicitly relied on Title VII principles in explaining that sexual harassment constitutes intentional "discrimination" under Title IX:

> Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.

Franklin, 503 U.S. at 74-75. Significantly, the Court relied on *Meritor*, a Title VII case, to resolve the issue.

A well established line of cases preceded the Supreme Court's decision to use Title VII principles in resolving a Title IX case. Prior to *Franklin*, courts had held that such principles are applicable in Title IX suits brought by employees of educational institutions. *See, e.g., Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988) (Title IX's legislative history "strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII."); *see also Preston v. Commonwealth of Virginia ex rel. New River Community College*, 31 F.3d 203, 207 (4th Cir. 1994); *Mabry v. State Bd. of Comm. Coll. & Occup. Educ.*, 813 F.2d 311, 316 n.6 (10th Cir. 1987), *cert. denied*, 484 U.S. 849 (1987). Courts had also relied on Title VII when evaluating Title IX sexual harassment claims by students. *See, e.g., Moire v. Temple Univ. Sch. of Medicine*, 613 F. Supp. 1360, 1366 & n.2 (E.D. Pa. 1985), *aff'd*, 800 F.2d 1136 (3d Cir. 1986) (hostile environment sexual harassment); *Alexander v. Yale Univ.*, 459 F. Supp. 1, 4 (D. Conn. 1977), *aff'd*,

631 F.2d 18 (2d Cir. 1980) (*quid pro quo* sexual harassment).

Since the Supreme Court's *Franklin* case, at least two circuit courts have found that Title VII standards are applicable to students' Title IX sexual harassment claims. *See Seamons v. Snow*, 84 F.3d 1226, 1232-33 & n.7 (10th Cir. 1996) (holding that although Title IX does protect against hostile environment sexual harassment in schools, plaintiff failed to state a valid claim because he did not allege that the harassment in question was based on sex); *Murray v. New York University College of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995) ("The [*Franklin*] Court's citation of *Meritor* . . ., a Title VII case, in support of *Franklin*'s central holding indicates that, in a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII."); *cf. Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1452 (9th Cir. 1994) (holding that although an analogy to Title VII might be available in future cases, the court need not reach the issue because defendant school counselor was entitled to qualified immunity against a claim that he failed to respond to known sexual harassment of the plaintiff by other students). *But cf. Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 165 (1996) (holding that student-on-student sexual harassment cannot be the basis for a cause of action under Title IX unless the plaintiff demonstrates that the school responded to sexual harassment claims differently based on sex.).

Additionally, virtually every district court to address the issue has held that Title IX, by analogy to Title VII, imposes liability on schools for failure to remedy severe and pervasive student-on-student sexual harassment. *See, e.g., Bruneau*, 935 F.Supp. at 172 ("When an employer fails to act to remedy a hostile environment created by

co-workers the employer discriminates against an individual in violation of Title VII. Similarly, [this] Court finds that in the Title IX context, when an educational institution fails to take steps to remedy peer-on-peer sexual harassment, it should be held liable to the harassed student for that discriminatory conduct."); *Bosley v. Kearney R-1 Sch. Dist.*, 904 F.Supp. 1006, 1021 (W.D. Mo. 1995) ("Following the [*Franklin*] Court's logic, the same rule as when an employer is held liable for a sexually hostile work environment under Title VII must apply when a school district has knwledge of a sexually hostile school environment and takes no action."); *see also Nicole M. v. Martinez Unified School Dist.*, No. C-93-4531 MHP, 1997 WL 193919, at *8 (N.D. Cal. Apr. 15, 1997); *Collier v. William Penn Sch. Dist.*, 956 F.Supp. 1209, 1213-14 (E.D. Pa. 1997); *Franks v. Kentucky School for the Deaf*, 956 F.Supp. 741, 746 (E.D. Ky. 1996); *Petaluma*, 949 F.Supp. at 1427; *Wright v. Mason City Community Sch. Dist.*, 940 F.Supp. 1412, 1419-20 (N.D. Iowa 1996); *Burrow*, 929 F.Supp. at 1205; *Oona R.-S.*, 890 F.Supp. at 1467-69 & n.13; *Patricia H. v. Berkely Unified Sch. Dist.*, 830 F.Supp. 1288, 1293 (N.D. Cal. 1993). *But see Garza v. Galena Park Indep. Sch. Dist.*, 914 F.Supp. 1437, 1438 (S.D. Tex. 1994).[4] Thus, the applicable case law firmly supports applying Title VII principles to delineate the scope of a school board's liability under Title IX for failure to remedy student-on-student sexual harassment.

Notwithstanding this abundant support for applying Title VII principles, the majority contends that Title VII principles may not be applied in this case because "the exposition of liability under Title VII depends upon agency principles." *See* Majority Op. at 25 n.14. The

[4] The majority emphasizes that only district courts have held that a cause of action exists for student-on-student sexual harassment under Title IX. However, the number of district courts that have so held provides strong support for the theory advanced by appellants in this case.

majority asserts that "[a]gency principles are useless in discussing liability for student-student harassment under Title IX, because students are not agents of the school board."[5] *Id.* This argument overlooks the Supreme Court's caveat in *Meritor* that "common law principles [of agency] may not be transferable in *all* their particulars to Title VII." *Meritor*, 477 U.S. at 72 (emphasis added).[6] Under *Meritor*'s flexible approach, courts have held that an employer may be held liable under Title VII for failing to take action to remedy a hostile environment created by non-employees, who are certainly not agents of the employer. *See, e.g., Powell v. Las Vegas Hilton Corp.,*

[5] The majority also argues that Title VII case law is inapplicable to Title IX because Title IX, unlike Title VII, was enacted under the Spending Clause. However, the Supreme Court has relied on Title VII in analyzing claims under Title VI, which also was enacted under the spending power. In *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983), for example, the Court found that Title VI's prohibition of discrimination was "subject to the construction given the antidiscrimination proscription of Title VII in *Griggs v. Duke Power Co. . . . .*" *Guardians*, 463 U.S. at 592. The Court also adopted Title VII's "business necessity" defense to analyze disparate impact claims in a Title VI case involving student placement. *See Board of Educ. v. Harris*, 444 U.S. 130, 151 (1979). Likewise, this court has utilized Title VII to analyze a disparate impact claim under Title VI, stating that "[t]he elements of a disparate impact claim may be gleaned by reference to cases decided under Title VII." *Georgia State Conf. of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985). Thus, the fact that Title VII is not a Spending Clause statute has not been a bar to importing its standards into Title VI, which formed the template for Title IX, and therefore should not be a bar to importing its standards into Title IX.

[6] As Judge Tjoflat has explained, "Title VII, as interpreted in *Meritor*, requires employers to take steps to ensure that sexual harassment does not permeate the workplace. To the extent that the application of common law agency principles frustrates Title VII's goal of eliminating such harassment—by effectively relieving the employer of the responsibility of pursuing that goal—those principles must yield." *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1544, 1546 n.2 (11th Cir. 1997) (Tjoflat, J., concurring in part, dissenting in part).

841 F.Supp. 1024, 1028 (D. Nev. 1992) (denying motion to dismiss blackjack dealer's claim that her employer violated Title VII by failing to protect her from sexual harassment by gamblers at her table, because "an employer could be liable for the sexual harassment of employees by non-employees, including its customers"); *Magnuson v. Peak Technical Services, Inc.*, 808 F.Supp. 500, 512-13 (E.D. Va. 1992) (holding that employers of alleged victim can be held liable for failing to take corrective action to remedy hostile environment created by non-employee); *see also Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982) ("The environment in which an employee works can be rendered offensive in an equal degree by the acts of supervisors, coworkers, or *even strangers to the workplace.*") (emphasis added) (internal citations omitted).[7] The employers were held liable in these cases by virtue of their own failure to comply with the duty of eliminating discrimination under Title VII—not under any theory of vicarious liability for the acts of a third party.

Application of Title VII principles also recognizes that a student should have the same protection in school that an employee has in the workplace.[8] *See Franklin*, 503

[7] Moreover, guidelines promulgated under Title VII recognize that an employer may be held liable for failing to take corrective action to remedy a hostile environment created by a third party. *See* 29 C.F.R. § 1604.11(e) ("An employer may also be responsible for the acts of nonemployees in the workplace . . ., where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action.").

[8] Indeed, where there are distinctions between the school environment and the workplace, they "serve only to emphasize the need for zealous protection against sex discrimination in the schools." *Patricia H.*, 830 F. Supp. at 1292-93. The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace, as students look to their teachers for guidance as well as for protection. The damage caused by sexual harassment also is arguably greater in the classroom than in the work-

U.S. at 74-75. Just as a working woman should not be required to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living," *Meritor*, 477 U.S. at 67 (internal citation omitted), a female student should not be required to run a gauntlet of sexual abuse in return for the privilege of being allowed to obtain an education. In the employment context, women historically have not had the power to simply walk away from an environment that is made to be demeaning, embarrassing, and humiliating for them because of their gender. Similarly, it is virtually impossible for female students to leave their assigned schools to escape an environment where they are harassed and intimidated on the basis of their gender. Just as in the employment setting where employees are dependent on their employers to ensure workplace equality, so too students are dependent on teachers and school officials to control the educational environment. Additionally, sexual harassment—regardless of its source—subordinates girls in the classroom jut as much as in the workforce. Although a hostile environment can be created by someone who supervises or otherwise has power over the victim, a hostile environment can also be created by co-workers or fellow students who have no direct power relationship whatsoever with the victim.[9] And like Title VII, Title IX was enacted to

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place, because the harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual harassment as accepted behavior. Moreover, "[a] nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program." *Id.* at 1293 (citation omitted).

[9] Numerous circuit courts, including this one, have held that an employer's failure to take prompt remedial action after notice of severe and pervasive sexual harassment by a co-worker is actionable. *See, e.g., Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982); *see also DeAngelis v. El Paso Municipal Police Officers*

remedy that discrimination and ensure sexual equality in public education.

Having determined that Title VII principles should guide our analysis of the scope of the school board's liability under Title IX, I conclude that Davis's allegations sufficiently plead a cause of action. The elements a plaintiff must prove to succeed in this type of sexual harassment case are: (1) that she is a member of a protected group; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of her education and create an abusive educational environment; and (5) that some basis for institutional liability has been established. *See Meritor*, 477 U.S. at 66-73; *see also Harris v. Forklift Sys. Inc.*, 114 S.Ct. 367, 370-71 (1993); *Lipsett*, 864 F.2d at 898-902; *Henson*, 682 F.2d at 903-05.

Assumed as true, the facts alleged in the complaint, together with all reasonable inferences therefrom, satisfy these elements. There is no question that the allegations satisfy the first three requirements. First, as a female, LaShonda is a member of a protected group. Second, she was subject to unwelcome sexual harassment in the form of "verbal and physical conduct of a sexual nature." 29 C.F.R. § 1604.11(a). Third, the harassment LaShonda faced clearly was on the basis of her sex.

As to the fourth requirement, I recognize that a hostile environment in an educational setting is not created by simple childish behavior or by an offensive utterance,

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Assoc., 51 F.3d 591, 593 (5th Cir. 1995); *Nichols v. Frank*, 42 F.3d 503, 508 (9th Cir. 1994); *Carr v. Allison Gas Turbine Div. Gen. Motors Corp.*, 32 F.3d 1007, 1009 (7th Cir. 1994); *Karibian v. Columbia University*, 14 F.3d 773, 779 (2d Cir.), *cert. denied*, 114 S.Ct. 2693 (1994); *Kauffman v. Allied Signal, Inc., Autolite Div.*, 970 F.2d 178, 182 (6th Cir.), *cert. denied*, 113 S. Ct. 831 (1992); *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342, 1345-46 (10th Cir. 1990); *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1015-16 (8th Cir. 1988).

comment, or vulgarity. Rather, Title IX is violated "[w]hen the [educational environment] is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's [environment] and create an abusive environment.'" *Harris*, 114 S. Ct. at 370 (quoting *Meritor*, 477 U.S. at 65, 67) (internal citations omitted). In determining whether a plaintiff has established that an environment is hostile or abusive, a court must be particularly concerned with (1) the frequency of the abusive conduct; (2) the conduct's severity; (3) whether it is physically threatening or humiliating rather than merely offensive; and (4) whether it unreasonably interferes with the plaintiff's performance. *Harris* at 371. The Court has explained that these factors must be viewed both objectively and subjectively. If the conduct is not so severe or pervasive that a reasonable person would find it hostile or abusive, it is beyond Title IX's purview. Similarly, if the plaintiff does not subjectively perceive the environment to be abusive, then the conduct has not actually altered the conditions of her learning environment, and there is no Title IX violation. *Id.* at 370.

In this case, the five months of alleged harassment was sufficiently severe and pervasive to have altered the conditions of LaShonda's learning environment from both an objective and a subjective standpoint: (1) G.F. engaged in abusive conduct toward LaShonda on at least eight occasions; (2) the conduct was sufficiently severe to result in criminal charges against G.F. to which he pled guility in state court; (3) the conduct, such as the groping and requests for sex, was physically threatening and humiliating rather than merely offensive; and (4) the conduct unreasonably interfered with LaShonda's academic performance, resulting in the substantial deterioration of her grades and emotional health. The facts alleged go far beyond simple horseplay, childish vulgarities, or adolescent flirting.

Finally, I believe that the fifth and final element—whether any basis for the Board's liability has been shown, has likewise been sufficiently alleged. Under Title VII, an employer may be held liable for a hostile environment of sexual harassment created by a co-worker if "the employer knew or should have known of the harassment in question and failed to take prompt remedial action." *Faragher*, 111 F.3d at 1538; *Henson*, 682 F.2d at 905; *see also Meritor*, 477 U.S. at 72-73. By analogy, in this instance the school board may be held liable if it knew or should have known of the harassment and failed to take timely remedial action. In Title VII cases, an employee can demonstrate that the employer knew of the harassment "by showing that she complained to higher management of the harassment or by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." *Henson*, 682 F.2d at 905. (citation omitted). In this case, Davis has alleged that she told the principal—a higher level manager —of the harassment on several occasions. She also alleged that at least three separate teachers, in addition to the principal, had actual and repetitive knowledge from LaShonda, her mother and other students. Finally, Davis alleged that despite this knowledge, the school officials failed to take prompt remedial action to end the harassment.[10] These allegations regarding institutional liability, as well as the other allegations, are sufficient to establish a prima facie claim under Title IX for sexual discrimination due to the Board's failure to take action to remedy a sexually hostile environment.

For all the foregoing reasons, I would reverse the district court's dismissal of Davis's Title IX claim against the Board.

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[10] The complaint also alleged that during the time of the harassment, the Board had no policy prohibiting the sexual harassment of students in its schools, and had not provided any policies or training to its employees on how to respond to student-on-student sexual harassment.

APPENDIX B

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 94-9121

AURELIA DAVIS,
a/n/f of Lashonda D.,
Plaintiff-Appellant,
v.

MONROE COUNTY BOARD OF EDUCATION,
CHARLES DUMAS and BILL QUERRY,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

Feb. 14, 1996

Before BIRCH and BARKETT, Circuit Judges, and HENDERSON, Senior Circuit Judge.

BARKETT, Circuit Judge:

Aurelia Davis, as mother and next friend of LaShonda D., appeals the district court's order dismissing her claims under Title IX and § 1983 against the Monroe County Board of Education ("Board"), Board Superintendent Charles Dumas and elementary school Principal Bill Querry (collectively "defendants"). Davis' complaint for injunctive relief and compensatory damages alleged that

LaShonda was sexually harassed on a continuous basis by a male, fifth-grade classmate, that defendants knew of the harassment yet failed to take any meaningful action to stop it and protect her, and that LaShonda suffered harm as a result of their failure to act. The defendants' failure to act, Davis asserted, discriminated against LaShonda and denied her the benefits of a public education in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88 (1988). Davis also claimed that defendants' omissions violated LaShonda's liberty interests to be free from sexual harassment and from intrusions on her personal security in violation of her substantive due process rights under the United States Constitution.

The district court dismissed the Title IX claim against the Board, concluding that

> [t]he sexually harassing behavior of a fellow fifth grader is not part of a school program or activity. Plaintiff does not allege that the Board or an employee of the Board had any role in the harassment. Thus, any harm to LaShonda was not proximately caused by a federally-funded educational provider.

Aurelia D. v. Monroe County Bd. of Educ., 862 F.Supp. 363, 367 (M.D.Ga.1994). The court also dismissed the § 1983 due process claims against the Board and the individual defendants.

On appeal, Davis argues that the court erred by dismissing her Title IX claim against the Board [1] and by dismissing her § 1983 due process claims against all defendants. She also contends that she made an equal protection claim on which the district court failed to rule. Because we find them without merit, we reject Davis' arguments regarding the due process and equal protection

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[1] Davis does not appeal the district court's dismissal of the Title IX claims against the individual defendants.

claims without further discussion. See 11th Cir. Rule 36-1. For the reasons that follow, however, we conclude that Davis' allegations that the Board knowingly permitted a hostile environment created by another student's sexual harassment of LaShonda state a valid Title IX claim against the Board and accordingly we reverse the dismissal of her complaint as to that claim.

I. BACKGROUND

Davis' factual allegations, presumed as true in our review of a motion to dismiss, Duke v. Cleveland, 5 F.3d 1399, 1402 (11th Cir.1993), can be summarized as follows. Over the six-month period between December 1992 and May 1993, "G.F.," a fellow fifth-grader at a Monroe County elementary school, sexually harassed and/or abused LaShonda by attempting to fondle her, fondling her, and directing offensive language toward her. In December, for instance, G.F. attempted to touch LaShonda's breasts and vaginal area, telling her, "I want to get in bed with you," and "I want to feel your boobs." Two similar incidents occurred in January 1993. In February, G.F. placed a doorstop in his pants and behaved in a sexually suggestive manner towards LaShonda. Other incidents occurred later in February and in March. In April, G.F. rubbed against LaShonda in the hallway in a sexually suggestive manner. G.F.'s actions increased in severity until he finally was charged with and pled guilty to sexual battery in May 1993.

LaShonda reported G.F. to her teachers and her mother after each of the incidents and, after all but one of the incidents, Davis called the teacher and/or the principal to see what could be done to protect her daughter. The requests for protection went unfulfilled. Following one incident, for example, LaShonda and other girls whom G.F. had sexually harassed asked their teacher for permission to report G.F.'s harassment to the principal. The

teacher denied the request, telling the girls, "[i]f he [the principal] wants you, he'll call you." After LaShonda told her mother of another incident of harassment, adding that she "didn't know how much longer she could keep him off her," Davis spoke with Principal Querry and asked what action would be taken to protect LaShonda. Querry responded, "I guess I'll have to threaten him [G.F.] a little bit harder," and he later asked LaShonda "why she was the only one complaining." LaShonda and Davis also asked that LaShonda, who had an assigned seat next to G.F., be allowed to move to a different seat. Even this request was refused and she was not allowed to move her seat away from G.F. until after she had complained for over three months. School officials never removed or disciplined G.F. in any manner for his sexual harassment of LaShonda.

Finally, the complaint alleged that G.F.'s uncurbed and unrestrained conduct severely curtailed LaShonda's ability to benefit from her elementary school education, lessening her capacity to concentrate on her schoolwork and causing her grades, previously all As and Bs, to suffer. The harassment also had a debilitating effect on her mental and emotional well-being, causing her to write a suicide note in April 1993.

II. STANDARD OF REVIEW

Reviewing the claim de novo, we will uphold the dismissal only if it appears beyond a doubt that the allegations in the complaint do not constitute a claim upon which relief may be granted. Hunnings v. Texaco, Inc., 29 F.3d 1480, 1484 (11th Cir.1994). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Taylor v. Ledbetter 818 F.2d 791, 794 n. 4 (11th Cir. 1987) (en banc), cert. denied, 489 U.S. 1065, 109 S.Ct. 1337, 103 L.Ed.2d 208 (1989) (quotation omitted).

III. DISCUSSION

Title IX provides in pertinent part as follows:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

20 U.S.C.§ 1681(a) (1988). It is undisputed that the Monroe County School System is a recipient of federal financial assistance. Accordingly, the issue before us is whether the Board's alleged failure to take action to stop G.F.'s sexual harassment of LaShonda "excluded [her] from participation in, . . . denied [her] the benefits of, or . . . subjected [her] to discrimination under" the Monroe County educational system on the basis of her sex.

Davis argues that the Board's failure to stop the sexual harassment discriminated against LaShonda and denied her the benefits of her education on the basis of sex. In support of this argument, Davis urges us to apply sexual harassment principles from the more extensive caselaw of Title VII, which prohibits sex discrimination in the workplace.[2] In relevant part, Title VII requires an employer to take steps to assure that the working environment of its employees is free from sexual harassment[3]

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[2] Title VII makes it unlawful "for an employer . . . to discriminate against any individual . . . because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1) (1988).

[3] Sexual harassment involves unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. 29 C.F.R. § 1604.11(a) (1991). Such harassment constitutes actionable sex discrimination in the workplace either as "quid pro quo" sexual harassment, which conditions employment benefits upon sexual favors, or as "hostile environment" sexual harassment, which creates an intimidating, hostile or offensive working environment that unreasonably interferes with an individual's work performance. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 62, 65, 106 S.Ct. 2399, 2403, 2404, 91 L.Ed.2d 49 (1986).

that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986) (quotation omitted). The Board contends, however, that Title VII principles are not applicable to Title IX cases such as the present one.

Enacted in 1972, Title IX was designed to protect individuals from sex discrimination by denying federal financial aid to those educational institutions that bear responsibility for sexually discriminatory practices. Cannon v. University of Chicago, 441 U.S. 677, 704 & n. 36, 99 S.Ct. 1946, 1961 & n. 36, 60 L.Ed.2d 560 (1979) (citing 117 Cong.Rec. 39252 (1971)). "It is a strong and comprehensive measure which . . . is needed if we are to provide women with solid legal protection as they seek education and training for later careers. . . ." Id. at 704 n. 36, 99 S.Ct. at 1961 n. 36 (quoting Sen. Birch Bayh, 118 Cong.Rec. 5806-07 (1972)). To accomplish this goal, employees and students of federally funded educational institutions who are discriminated against on the basis of sex have a private right of action under Title IX for injunctive relief and compensatory damages. Id. at 717, 99 S.Ct. at 1968; Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 75-76, 112 S.Ct. 1028, 1037-38, 117 L.Ed.2d 208 (1992). Moreover, in interpreting Title IX, "[t]here is no doubt that if we are to give [it] the scope that its origins dictate, we must accord it a sweep as broad as its language." North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521, 102 S.Ct. 1912, 1918, 72 L.Ed.2d 299 (1982) (quotation omitted).

Although the Supreme Court recognized a private right of action under Title IX in 1979, see Cannon, 441 U.S. at 717, 99 S.Ct. at 1968, until recently the denial of financial aid to the institution was the only remedy to a Title IX plaintiff. Accordingly, early lawsuits brought under

Title IX primarily challenged discriminatory practices in athletic programs and admissions policies. See, e.g., id. at 680, 99 S.Ct. at 1949. In 1992, however, the Supreme Court unanimously allowed monetary damages to private plaintiffs for intentional violations of Title IX, see Franklin, 503 U.S. at 76, 112 S.Ct. at 1038, increasing the number of Title IX suits brought by employees and students alleging that their educational institutions subjected them to sexual discrimination.

In receiving sexual discrimination claims by teachers and other employees of educational institutions under Title IX, courts have regularly applied Title VII principles. In Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir.1988), for example, the plaintiff was a female medical student in the residency program and also was an employee of the University. Id. at 886. She alleged that University hospital supervisory personnel had subjected her to an atmosphere of sexual harassment at the hospital. Id. at 886-92. In determining that Title VII sexual harassment principles applied to this "mixed employment-training" context, the Second Circuit relied on Title IX's legislative history, "which strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII." Id. at 897; see also Preston v. Commonwealth of Virginia ex rel. New River Community College, 31 F.3d 203, 207 (4th Cir.1994); Mabry v. State Bd. of Community Colleges, 813 F.2d 311, 316 n. 6 (10th Cir.1987).

Courts also have relied upon Title VII when evaluating Title IX sexual harassment claims by students. In determining that Title IX prohibits a teacher's quid pro quo sexual harassment of a student, for example, one court observed that

> [it is] perfectly reasonable to maintain that academic achievement conditioned upon submission to sexual demands constitutes sex discrimination in education,

> just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII's ban against sex discrimination in employment
> . . . .

Alexander v. Yale Univ., 459 F.Supp. 1, 4 (D.Conn. 1977), aff'd, 631 F.2d 178 (2d Cir.1980). Similarly, in recognizing that Title IX prohibits the existence of a hostile environment due to a teacher's sexual harassment of a student, another court observed that "[t]hough the sexual harassment 'doctrine' has generally developed in the context of Title VII, these [Title VII] guidelines seem equally applicable to Title IX." Moire v. Temple Univ. Sch. of Medicine, 613 F.Supp. 1360, 1366 n. 2 (E.D.Pa. 1985), aff'd, 800 F.2d 1136 (3dCir.1986).

Nonethless, in Franklin v. Gwinnett County Public Schools, 911 F.2d 617 (11th Cir.1990), rev'd, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992), this court declined to apply a Title VII analysis to the question of whether compensatory damages were available in a suit brought by a student under Title IX. Id. at 622. On appeal, however, the Supreme Court reversed, and relied upon Title VII principles and authority in holding that Title IX authorizes an award of compensatory damages. Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 74-75, 112 S.Ct. 1028, 1037, 117 L.Ed.2d 208 (1992). Franklin involved a high-school student's allegations that a teacher had sexually harassed and assaulted her and that school officials, who had actual knowledge of the misconduct, had failed to intervene. Id. at 63-64, 112 S.Ct. at 1031. In rejecting the argument that the specific language of Title IX did not give educational institutions sufficient notice of their liability for damages for such discrimination, the Supreme Court stated:

> Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's

> sex, that supervisor 'discriminate[s]' on the basis of sex." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 [106 S.Ct. 2399, 2404, 91 L.Ed.2d 49] (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe. Franklin, 503 U.S. at 75, 112 S.Ct. at 1037. Importantly, the Court relied on Title VII principles and cited Meritor, a Title VII case, to resolve the issue.

Subsqequently, several courts have understood Franklin to authorize the application of the Title VII standards to a student's Title IX sexual harassment claim against her school. In Murray v. New York University College of Dentistry, 57 F.3d 243 (2d Cir.1995), the Second Circuit looked to Title VII in addressing a student's Title IX claim that she was subjected to a sexually hostile educational environment created by a patient at the dental school. Id. at 248. The district court had dismissed the complaint after determining that the facts alleged were insufficient to show that the college knew that plaintiff was subjected to a hostile environment created by the patient's persistent sexual advances. Id. at 247-48. In considering the appropriate standard for determining whether the college had notice of the hostile environment, the Second Circuit observed: "[t]he [Franklin] Court's citation of Meritor . . ., a Title VII case, in support of Franklin's central holding indicates that, in a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII." Murray, 57 F.3d at 249. Upon application of Title VII standards, the Second Circuit determined that the facts alleged were insufficient to show that the college had notice of the hostile environment. Id. at 249-51.

Similarly, the District Court for the Northern District of California relied on Franklin in determining that a

student may state a Title IX claim for hostile environment sexual harassment where the harassment is initiated by fellow students. In Doe v. Petaluma School District, 830 F.Supp. 1560 (N.D.Cal.1993), the plaintiff alleged that she was harassed when she was a seventh- and eighth-grade student in the defendant school district. The harassment allegedy began early in plaintiffs seventh-grade year, when two male student sapproached her and said "I hear you have a hot dog in your pants." Id. at 1564. Over the next year and a half, other students regularly made similarly offensive remarks to plaintiff and spread sexual rumors and innuendoes about her. During this period, plaintiff and her parents spoke with her school counselor on numerous occasions and asked him to stop the harassment. The counselor told them he would take care of everything, but he initially did nothing more than warn some of the offenders, stating that "boys will be boys." Id. at 1564-65. After the harassment and complaints had continued for more than a year, the counselor suspended two of the students. Id. at 1565. By that time, however, going to school had become emotionally difficult for plaintiff, and she ultimately transferred to a private school at her parents' expense in order to avoid the harassment. Id. at 1565-66.

Plaintiff filed suit under Title IX against the school district and several school officials for their failure to take action to stop the sexual harassment inflicted upon her by her classmates. Id. at 1563. Denying defendants' motion to dismiss for failure to state a claim, the court held that Title IX proscribes the same type of hostile environment sexual harassment prohibited by Title VII. Id. at 1571-75. In addition to relying on Franklin and Title IX's legislative history, the court looked to findings of the Department of Education's Office of Civil Rights ("OCR"). Petaluma, 830 F.Supp. at 1572 (citing Patricia H. v. Berkeley Unified Sch. Dist., 830 F.Supp. 1288 (N.D.Cal. 1993)). These findings demonstrated an OCR belief that "an educational institution's failure to take appropriate

response to student-to-student sexual harassment of which it knew or had reason to know is a violation of Title IX." Id. at 1573 (citations omitted). The court concluded that to deny recovery to a sexually harassed student under the hostile environment theory "would violate the Supreme Court's command to give Title IX a sweep as broad as its language." Id. at 1575.

We likewise find it appropriate to apply Title VII principles to the question before us. As discussed in the foregoing cases, such application is supported by Franklin, Title IX's legislative history and the Supreme Court's mandate that we read Title IX broadly, as well as by findings of the OCR. In particular, the OCR has found that a student is subjected to sexual harassment when "unwelcome sexual advances, requests for sexual favors, or other sex-based verbal or physical conduct . . . has the purpose or effect of unreasonably interfering with the individual's education creating an intimidating, hostile, or offensive environment." Letter of Findings by John E. Palomino, Regional Civil Rights Director, Region IV (July 24, 1992), Docket No. 09-92-6002, at 2.[4] The OCR also has found that "[w]hen individuals who are participating in a program or activity operated by an educational institution are subjected to sexual harassment, they are receiving treatment that is different from others." Id. Finally, the OCR has found that "[i]f the harassment is carried out by non-agent students, the institution may nevertheless be found in noncompliance with Title IX if it failed to respond adequately to actual or constructive notice of the harassment." Id.; see also Letter of Findings by Kenneth A.

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[4] OCR Letters of Findings are entitled to deference "as they express the opinion of an agency charged with implementing Title IX and its regulations." Petaluma, 830 F.Supp. at 1573. As the Supreme Court has stated, "this Court normally accords great deference to the interpretation, particularly when it is longstanding, of the agency charged with the statute's administration." North Haven, 456 U.S. at 522 n. 12, 102 S.Ct. at 1918 n. 12.

Mines, Regional Civil Rights Director, Region V (April 27, 1993), Docket No. 05-92-1174, at 2-4. Thus, in informally determining that Title IX prohibits peer sexual harassment in the schools, the OCR has relied on Title VII hostile environment principles.

Application of these principles to Title IX claims by students recognizes, as the Supreme Court acknowledged in Franklin, that a student should have the same protection in school that an employee has in the workplace. See Franklin, 503 U.S. at 74-75, 112 S.Ct. at 1037. Indeed, where there are distinctions between the school environment and the workplace, they "serve only to emphasize the need for zealous protection against sex discrimination in the schools." Patricia H., 830 F.Supp. at 1292-93. The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace, as students look to their teachers for guidance as well as for protection. The damage caused by sexual harassment also is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual hasassment as accepted behavior. Moreover, as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school. Finally, "[a] non-discriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program." Id. at 1293 (quotation omitted).

Thus, we conclude that as Title VII encompasses a claim for damages due to a sexually hostile working environment created by co-workers and tolerated by the employer, Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising author-

ities knowingly fail to act to eliminate the harassment.[6] Cf. Franklin, 503 U.S. at 74-75, 112 S.Ct. at 1037; see Murray, 57 F.3d at 249; Petaluma, 830 F.Supp. at 1575. But see Seamons v. Snow, 864 F.Supp. 1111, 1118 (D. Utah 1994).

In this case, by requiring that a school employee commit the harassing action in order for Davis to state a claim, the district court failed to recognize the nature of a claim for hostile environment sexual harassment. The court dismissed the complaint because, in its view, "any harm to LaShonda was not proximately caused by a federally-funded educational provider" and neither the Board nor an employee of the Board "had any role in the harassment.[1] Aurelia D., 862 F.Supp. at 367 (emphasis added). The court's rationale thus implicitly limited sexual harassment actions to quid pro quo harassment, which conditions benefits or maintenance of the status quo upon sexual favors. This was not Davis' claim.

[5] The Board argues that Title VII caselaw is inapplicable to Title IX because Title IX was enacted under the spending clause. The Supreme Court, however, has relied on Title VII in analyzing claims under Title VI, which also was enacted under the spending clause. In Guardians Association v. Civil Service Commission, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983), for example, the Court found that Title VI's prohibition of discrimination was "subject to the construction given the antidiscrimination provision in Title VII in Griggs v. Duke Power Co. [401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)] . . . ." Guardians, 463 U.S. at 592, 103 S.Ct. at 3227. The Court also adopted Title VII's "business necessity" defense to analyze disparate impact claims in a Title VI case involving student placement. See Board of Educ. v. Harris, 444 U.S. 130, 151, 100 S.Ct. 363, 375, 621 L.Ed.2d 275 (1979). Likewise, we have utilized Title VII to analyze a disparate impact claim under Title VI, stating that "[t]he elements of a disparate impact claim may be gleaned by reference to cases decided under Title VII." Georgia State Conf. of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985). Thus, the fact that Title VII is not a spending clause statute has not been a bar to importing its standards into Title VI, and therefore is no bar to importing its standards into Title IX.

The evil Davis sought to redress through her hostile environment claim was not the direct act of a school official demanding sexual favors, but rather the officials' failure to take action to stop the offensive acts of those over whom the officials exercised control. Title VII recognizes this distinction and requires employers to take steps to assure that their employees' working environment is free from sexual harassment regardless of whether that harassment is caused by the sexual demands of a supervisor or by the sexually hostile environment created by supervisors or co-workers. Henson v. Dundee, 682 F.2d 897, 905 (11th Cir.1982).[6] Under this concept, when an employer knowingly fails to take action to remedy a hostile environment caused by one co-worker's sexual harassment of another, the employer "discriminate[s] against . . . an[ ] individual" in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1).

Likewise, when an educational institution knowingly fails to take action to remedy a hostile environment caused by a student's sexual harassment of another, the harassed student has "be[en] denied the benefits of, or be[en] subjected to discrimination under" that educational program in violation of Title IX, 20 U.S.C. § 1681(a). Just as a working woman should not be required to "run

[6] Other circuits also recognize employer liability under Title VII based on the employer's failure to take action to remedy a hostile environment created by coworkers. See Smith v. Bath Iron Works, 943 F.2d 164, 165-66 (1st Cir.1991); Karibian v. Columbia Univ., 14 F.3d 773, 779 (2d Cir.), cert. denied, 512 U.S. 1213, 114 S.Ct. 2693, 129 L.Ed.2d 824 (1994); Levendos v. Stern Entertainment, Inc., 909 F.2d 747, 749 (3d Cir.1990); DeAngelis v. El Paso Municipal Police Officers Assoc., 51 F.3d 591, 593 (5th Cir.1995); Kauffman v. Allied Signal, Inc., Autolite Div., 970 F.2d 178, 182 (6th Cir.), cert. denied, 506 U.S. 1041, 113 S.Ct. 831, 121 L.Ed.2d 701 (1992); Carr v. Allison Gas Turbine Div. Gen Motors, 32 F.3d 1007, 1009 (7th Cir.1994); Hall v. Gus Construction Co., 842 F.2d 1010, 1015-16 (8th Cir.1988); Nichols v. Frank, 42 F.3d 503, 508 (9th Cir.1994); Baker v. Weyerhaeuser Co., 903 F.2d 1342, 1345-46 (10th Cir.1990).

a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living," Meritor, 477 U.S. at 67, 106 S.Ct. at 2405 (quotation omitted), a female student should not be required to run a gauntlet of sexual abuse in return for the privilege of being allowed to obtain an education.

Having determined that Title IX encompasses a claim for a hostile learning environment created by peer sexual harassment, we must consider the sufficiency of Davis' allegations. The elements a plaintiff must prove to succeed in this type of sexual harassment case are: (1) that she is a member of a protected group; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of her education and create an abusive educational environment; and (5) that some basis for institutional liability has been established. Cf. Meritor, 477 U.S. at 66-73, 106 S.Ct. at 2405-08; see also Harris v. Forklift Sys. Inc., 510 U.S. 17, ——-——, 114 S.Ct. 367, 370-71, 126 L.Ed.2d 295 (1993); Henson, 682 F.2d at 903-05.

Assumed as true, the facts alleged in the complaint, together with all reasonable inferences therefrom, satisfy these elements. There is no question that the allegations satisy the first three requirements. First, as a female, LaShonda is a member of a protected group. Second, she was subject to unwelcome sexual harassment in the form of "verbal and physical conduct of a sexual nature." 29 C.F.R. § 1604.11(a). Third, the harassment LaShonda faced was clearly on the basis of her sex.

As to the fourth requirement, we recognize that a hostile environment in an educational setting is not created by a simple childish behavior or by an offensive utterance, comment, or vulgarity. Rather, Title IX is violated "when the [educational environment] is permeated with 'discriminatory intimidation, ridicule, and insult' that

is 'sufficiently severe or pervasive to alter the conditions of the victim's [environment] and create an abusive environment,'" Harris, 510 U.S. at ——, 114 S.Ct. at 370 (quoting Meritor, 477 U.S. at 64-65, 106 S.Ct. at 2404 (internal citations omitted). In determining whether a plaintiff has established that an environment is hostile or abusive, a court must be particularly concerned with (1) the frequency of the abusive conduct; (2) the conduct's severity; (3) whether it is physically threatening or humiliating rather than merely offensive; and (4) whether it unreasonably interferes with the plaintiff's performance. Id. at ——, 114 S.Ct. at 371. The Court has explained that these factors must be viewed both objectively and subjectively. If the conduct is not so severe or pervasive that a reasonable person would find it hostile or abusive, it is beyond Title IX's purview. Similarly, if the plaintiff does not subjectively perceive the environment to be abusive, then the conduct has not actually altered the conditions of her learning environment, and there is no Title IX violation. Id. at ——-——, 114 S.Ct. at 370-71.

Turning to the case before us in light of the relevant factors, we find the five months of alleged harassment sufficiently severe and pervasive to have altered the conditions of LaShonda's learning environment from both an objective and a subjective standpoint: (1) G.F. engaged in abusive conduct toward LaShonda on at least eight occasions; (2) the conduct was sufficiently severe to result in criminal charges against G.F.; (3) the conduct, such as the groping and requests for sex, was physically threatening and humiliating rather than merely offensive; and (4) the conduct unreasonably interfered with LaShonda's academic performance, resulting in the substantial deterioration of her grades and emotional health. The facts alleged go far beyond simple horseplay, childish vulgarities or adolescent flirting.

Finally, we consider the fifth and final element—whether any basis for the Board's liability has been shown. Under

Title VII, whether the harassing conduct of a supervisor or co-worked should be imputed to the employer is determined in accordance with common-law principles of agency. See Meritor, 477 U.S. at 72, 106 S.Ct. at 2408; Murray, 57 F.3d at 249. Under the agency theory of respondeat superior, this court holds employers liable for a hostile environment created by a co-worker where the plaintiff can show that "the employer knew or should have known of the harassment in question and failed to take prompt remedial action." Henson, 682 F.2d at 905. An employee can demonstrate that the employer knew of the harassment "by showing that she complained to higher management of the harassment or by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." Id. (citation omitted).

In this case, Davis has alleged that she told the principal —a higher level manager—of the harassment on several occasions. She also alleged that at least three separate teachers, in addition to the principal, had actual and repetitive knowledge from LaShonda, her mother and other students. Finally, Davis alleged that despite this knowledge, the school officials failed to take prompt and remedial action to end the harassment.[7] These allegations regarding institutional liability, as well as the other allegations, are sufficient to establish a prima facie claim under Title IX for sexual discrimination due to the Board's failure to take action to remedy a sexually hostile environment.

IV. CONCLUSION

In light of the foregoing, we affirm the district court's judgment with the exception of its dismissal of the Title

[7] The complaint also alleged that during the time of the harassment, the Board had no policy prohibiting the sexual harassment of students in its schools, and had not provided any policies or training to its employees on how to respond to student-on-student sexual harassment.

IX claim against the Board. We reverse the district court's dismissal of that claim and remand for proceedings consistent herewith.

AFFIRMED in part; REVERSED in part; REMANDED.

BIRCH, Circuit Judge, concurring in part and dissenting in part:

Although I concur in the court's affirmance of the district court's dismissal of Davis's section 1983 claim, I disagree with the majority's holding that Davis's allegations state a valid claim against the Monroe County Board of Education under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1990 & Supp. 1995) ("Title IX").

This case does not involve allegations that an employee of the school district sexually harassed LaShonda D., but rather that the school district negligently failed to prevent another student from harassing LaShonda. The majority is correct in noting that the Supreme Court has held that "Title IX is enforceable through an implied right of action." Franklin v. Gwinnett County Pub. Sch. 503 U.S. 60, 65, 112 S.Ct. 1028, 1932, 117 L.Ed.2d 208 (1992) (citing Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)). However, Franklin involved a high-school student's allegations that a teacher had sexually harassed and assaulted her, and that school officials, who had actual knowledge of the teacher's conduct, failed to intervene. 503 U.S. at 63-64, 112 S.Ct. at 1031-32. The student-on-student sexual harassment alleged in this case is analytically quite distinct from that in Franklin, and the majority makes an unprecedented extension in holding that Title IX encompasses a claim of hostile environment sexual harassment based on the conduct of a student. There is not indication in the language

of Title IX that such a cause of action was intended to be covered by its scope; rather, the statute states that "[n]o person in the United States shall, on the basis of sex, . . . be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). In this case, the school board, which is clearly an educational "program or activity" under 20 U.S.C. § 1687, is not alleged to have committed any act of harassment against LaShonda, nor is any employee of the school board. Rather, the plaintiff seeks to hold the school board liable for negligently failing to prevent another student, not its employee, from sexually harassing LaShonda. In my opinion, this student-on-student sexual harassment case clearly falls outside the purview of Title IX.

Even if I were to accept the majority's conclusion that Title IX encompasses student-on-student sexual harassment, I would limit that holding to intentional conduct on the part of the school board. Here, what is alleged is that the school board was negligent in failing to intervene to prevent the recurring student-on-student harassment. The majority relies on Franklin in reaching its conclusion that Title IX covers such behavior, even though the Franklin case involved intentional behavior on the part of a teacher; absent an indication to the contrary, Franklin should be limited to its facts. But rather than do this, the majority not only broadly reads it to cover student-to-student sexual harassment, but also to cover negligent behavior on the part of the school board.

Lastly, I would limit the remedy available to a plaintiff in the case of unintentional violations of Title IX to injunctive relief. Franklin involved intentional discrimination by the school board on the basis of sex, and thus involved an intentional violation of Title IX. The Supreme Court has held that in the case of intentional violations of Title IX, monetary damages are available to the victim of

the sexual harassment. Franklin, 503 U.S. at 73-75, 112 S.Ct. at 1037. What the Supreme Court did not decide in Franklin, however, was whether monetary damages are available in cases involving unintentional violations of Title IX. Most courts have interpreted Title IX along the same lines as similar statutes, such as Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-4a (1994 & Supp. 1995). Since the Supreme Court has expressly found that Title VI does not support a monetary damages remedy for Title VI violations not involving intentional discrimination, Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582, 602-03, 103 S.Ct. 3221, 3232-33, 77 L.Ed.2d 866 (1983), we similarly should find that monetary damages are limited to intentional violations of Title IX.[1] Therefore, even if I were to accept the majority's argument that Title IX applies to the conduct at issue in this case, I would limit the remedy available to the plaintiff to injunctive relief.

Accordingly, I CONCUR in part and DISSENT in part.

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[1] At least one federal district court has reached this conclusion as well. See Doe v. Petaluma City Sch. Dist. 830 F.Supp. 1560, 1571 (N.D.Cal.1993) (finding that "Title IX does prohibit hostile environment sexual harassment but that to obtain damages (as opposed to declaratory or injunctive relief), one must allege and prove intentional discrimination on the basis of sex by an employee of the educational institution"). The Doe court specifically held that "[t]o obtain damages, it is not enough that the institution knew or should have known of the hostile environment and failed to take appropriate action to end it." Id.

APPENDIX C

UNITED STATES DISTRICT COURT
M.D. GEORGIA
MACON DIVISION

Civ. A. No. 94-140-4-MAC (WDO)

AURELIA D.,
as Next Friend of LaShonda D.,
Plaintiffs,

v.

MONROE COUNTY BOARD OF EDUCATION, *et al.*,
Defendants.

Aug. 29, 1994

ORDER

OWENS, Chief Judge.

Plaintiff Ms. D. has brought suit on behalf of her daughter LaShonda against defendants the Monroe County School Board ("the Board"), Mr. Dumas, Superintendent of the Board, and Mr. Querry, Principal of Hubbard Elementary School concerning alleged harassment of LaShonda by a fellow classmate. Defendants have moved to dismiss the complaint under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. In evaluating this motion, the court considered the facts as alleged in the complaint. After careful consideration of the arguments of counsel and the relevant statutes and case law, the court issues the following order.

I. FACTS

Beginning about December 17, 1992, and continuing through May 19, 1993, LaShonda began to be harassed by a fellow fifth-grade student, G.F., during school hours. The harassment consisted of repeated attempts by G.F. to touch LaShonda's breasts and vaginal area, and use of vulgar language towards LaShonda.[1] G.F. spoke offensively towards LaShonda on or about January 2, 1993, and January 20, 1993. After each of these incidents, LaShonda notified her classroom teacher, Ms. Fort. Ms. D. called Ms. Fort to follow up on her daughter's complaints and Ms. Fort assured her that Principal Querry had been notified.

On February 3, 1993, while in gym class, G.F. placed a door stop in his pants and behaved in a sexually suggestive manner towards LaShonda. LaShonda reported this incident to her gym teacher. G.F. engaged in harassing behavior again on February 10, 1993, and on March 1, 1883, which LaShonda reported to her teachers. LaShonda and other girls who had been harassed by G.F. asked their teacher if they could go as a group to the principal's office but were not allowed to do so. On approximately April 12, 1993, while in a school hallway, G.F. rubbed his body against LaShonda in a suggestive manner. LaShonda once again notified her teacher of G.F.'s behavior.

On May 19, 1993, LaShonda complained to her mother that she did not know how much longer she could tolerate G.F.'s actions. When contacted by Ms. D, Mr. Querry said that we would "threaten the boy (G.F) a little bit harder". Mr. Querry also asked why LaShonda "was the only one complaining". Ms. D. then called the Board's superintendent to complain about G.F. and Mr. Querry.

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[1] The vulgar language included statements such as, "I want to get in bed with you" and "I want to feel your boobs".

The complaint further alleges that LaShonda's assigned seat in Ms. Fort's class was next to G.F.'s seat, but that she was not allowed to change seats until she had complained of the offensive behavior for over three months. Plaintiff also alleges that G.F. pled guilty to charges of sexual battery concerning the school incidents.

As a result of G.F.'s conduct, LaShonda's mental health and ability to concentrate were detrimentally affected and her grades declined. Plaintiff seeks to hold the school responsible under § 1983 and Title IX because they failed to discipline G.F. or otherwise act to curtail his conduct which proximately caused LaShonda's mental and emotional stress. Plaintiff alleges that the Board's failure to institute a policy concerning student-to-student sexual harassment proximately caused her daughter's distress.

In count two, plaintiff charges that the school engaged in racial discrimination when it disciplined G.F. for striking a white female student and not when he harassed LaShonda, a black female.

II. DISMISSAL STANDARD

A motion to dismiss under Rule 12(b)(6) attacks the legal sufficiency of the complaint. A complaint should not be dismissed for failure to state a claim unless the plaintiff can prove no set of facts entitling him to relief. Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232-33, 81 L.Ed.2d 59 (1984) (citing Conley v. Gibson, 335 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957)); Pataula Electric Membership Corp. v. Whitworth, 951 F.2d 1238, 1240 (11th Cir.1992). The court is to presume true all of the complaint's allegations and make all reasonable inferences in favor of the plaintiff. Miree v. DeKalb County, Georgia, 433 U.S. 25, 27 n. 2. 97 S.Ct. 2490, 2492 n. 2, 53 L.Ed.2d 557 (1977); Linder v. Portocarrero, 963 F.2d 332, 334 (11th Cir.1992); Duke v. Cleland, 5 F.3d 1399, 1402 (11th Cir.1993).

The rules require nothing more than "a short and plain statement" that will give the defendant fair notice of the claims and the grounds upon which they are based. Conley, 355 U.S. at 47, 78 S.Ct. at 103.

III. DISCUSSION

A. Section 1983—Failure to Protect Claim

The complaint alleges that the principal was responsible for supervising and disciplining students and that his failure to intervene and discipline G.F. or have a policy concerning sexual harassment of students proximately caused LaShonda's mental and emotional distress. The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." Plaintiff contends that defendants deprived LaShonda of her liberty interest in being free from sexual harassment and intrusions on her personal security by failing to adequately protect her from her classmate's unwanted advances. See Ingraham v. Wright, 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1977).

The constitutional guarantees limit the conduct of state actors. The state has no constitutional duty to protect its citizens from private persons. DeShaney v. Winnebago County Dept. of Social Servs., 489 .S. 189, 195, 109 S.Ct. 998, 1002, 103 L.Ed.2d 249 (1989); D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3rd Cir.1992), cert. denied, 506 U.S. 1079, 113 S.Ct. 1045, 122 L.Ed.2d 354 (1993).

Only where the state has acted to render the person incapable, or significantly less capable, of caring for or protecting himself does the state owe a duty of care to the individual. For example, when the state enters into a special relationship with a citizen, it may be held liable for failure to care for and protect him. See Youngberg v.

Romeo, 457 U.S. 307, 309, 102 S.Ct. 2452, 2454, 73 L.Ed.2d 28 (1982) (when a person is institutionalized and made dependent on the state, the state undertakes a duty to provide certain services to the person); Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (state required to provide adequate medical care to incarcerated prisoners). Section 1983 liability attaches only when the state breaches an affirmative duty which it owes to its citizens. See Cornelius v. Town of Highland Lake, Ala., 880 F.2d 348, 353 (11th Cir.1989), cert. denied, 494 U.S. 1066, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990). The Supreme Court has not extended the duty of care based upon a "special relationship with the state" beyond the cases of incarcerated prisoners and involuntarily committed mental patients. J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267, 272 (7th Cir.1990).

The state can also be charged with a duty of care where it places the individual in a dangerous situation or makes him more vulnerable to harm. Cornelius, 880 F.2d at 352; Wood v. Ostrander, 879 F.2d 583 (9th Cir.1989), cert. denied, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990). In Wood, an officer arrested an intoxicated driver and impounded his car, leaving his female passenger on the roadside in a high crime area at 2:30 a.m. The woman was raped by a man who offered her a ride home. The court found that under the facts alleged the officer owed the woman a duty not to be deliberately indifferent to her personal security. This duty arose because the officer acted to place her in danger. The common thread between cases where § 1983 liability has been imposed for harm inflicted by third parties is that the state affirmatively placed the individual in a position where he is significantly less able to care for himself than an ordinary citizen. The key factor is state control or custody over a person. See Russell v. Fannin County Sch. Dist., 784 F. Supp. 1576, 1582 (N.D.Ga.1992).

In contrast to this line of cases, LaShonda has not alleged any special relationship between herself and the school, nor has she alleged that defendants placed her in a dangerous situation. In short, the state did not act to make her less capable of caring for herself. Plaintiff relies upon the mandatory attendance policy to support a special relationship between the school and its students. However, a number of other courts have rejected this suggestion. The Third Circuit, in Middle Bucks, reasoned that despite a mandatory attendance policy and the fact that a school has loco parentis authority over the children, students are not in state custody during school hours. Middle Bucks, 972 F.2d at 1371. In concluding that parents remain the primary caretakers of their children, the Third Circuit considered that parents decide whether to educate their children at home or in public or private schools, and that children are in school for a limited time and can turn to their parents for help each day. Id. The Seventh Circuit came to the same conclusion in Alton, 909 F.2d at 272-73. This court agrees with the reasoning in both Middle Bucks and Alton. LaShonda has not alleged facts from which any of the defendants owed her a duty of protection.[2] Accordingly, plaintiff's claim under § 1983 is DISMISSED for failure to state a claim upon which relief can be granted.

B. Qualified Immunity

State officials exercising discretionary powers are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or

[2] Plaintiff urges that defendants are liable under § 1983 because they failed to properly train LaShonda's teachers in deliberate indifference to her right to personal security. City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). However, Canton involved an allegation that police officers deliberately denied medical care to someone in their custody. The holding imposes no duty on the state to train state agents to prevent harm from private actors to persons not in state control or custody.

constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). "[A] necessary concomitant to the determination of whether a constitutional right . . . is clearly established at the time the defendant acted is the determination of whether the plaintiff has asserted a constitutional violation at all." Siegert v. Gilley, 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991). Having found that plaintiff has not alleged a deprivation of a constitutional right, defendants Dumas and Querry are entitled to qualified immunity. Id.

C. Title IX

Plaintiff also alleges that the failure to protect LaShonda from her classmate's advances violated Title IX.[3] 20 U.S.C. § 1681, et seq. The Supreme Court has held that Title IX is enforceable through an implied right of action. Franklin v. Gwinnett County Public Sch., 503 U.S. 60, 112 S.Ct. 1028, 1032, 117 L.Ed.2d 208 (1992). However, only federally-funded institutions can be held liable for violating the statute. Lipsett v. Univ. of Puerto Rico, 864 F.2d 881, 901 (1st Cir.1988). Accordingly, plaintiff's claims against individuals under Title IX are DISMISSED.

Moreover, plaintiff's claim against the Board has no basis in law. The sexually harassing behavior of a fellow fifth grader is not part of a school program or activity. Plaintiff does not allege that the Board or an employee of

[3] Title IX, 20 U.S.C. § 1681, prohibits discrimination on the basis of sex in the provision of educational services by federally-funded educational programs. Section 1681(a) provides that "[n]o person . . . shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." The definition of a "program or activity" includes "all of the operations of . . . a local educational agency . . . or other school system." 20 U.S.C. § 1687(2)(B).

the Board had any role in the harassment. — Thus any harm to LaShonda was not proximately caused by a federally-funded educational provider.

Another district court has suggested that a Title IX cause of action could be based upon allegations of a school's inaction in the face of complaints of student- to-student harassment where the inaction was intended to discriminate against the child on the basis of sex. Doe v. Petaluma City Sch. Dist., 830 F.Supp. 1560, 1576 (N.D. Cal.1993). However, this court finds no basis for such a cause of action in Title IX or case law interpreting it.

D. Section 1981—Racial Discrimination Claim

Principal Querry disciplined G.F. after he struck a white girl and plaintiff asserts that his failure to act accordingly when G.F. harassed LaShonda displayed the Board's intent to discriminate on the basis of race.[4] Complaint ¶ 31. The court finds that this allegation fails to state a cause of action against the Board under 42 U.S.C. § 1981.[5] To pursue a claim against the School Board under § 1981, plaintiff must show that the conduct was the result of a policy or custom of the Board.

The Civil Rights Act precludes imposition of liability on the basis of a supervisory position alone. Jett. v. Indep. Sch. Dist., 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989); Polk County v. Dodson, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981); Monell —v. Dept. of Social Servs., 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). A supervisory official may be held liable for a civil rights violation where it can be shown

[4] The complaint does not allege that Principal Querry had an intent to discriminate on the basis of race.

[5] The complaint states that the racially discriminatory actions violate "both the Education Act of 1972 and the Civil Rights Act of 1991." Since 29 U.S.C. § 1681, et seq., concerns gender discrimination, the court interprets this paragraph of the complaint as alleging a claim under 42 U.S.C. § 1981 alone.

that a constitutional violation has occurred as a direct result of a policy or procedure of the supervising official. Jett, 491 U.S. at 735-36, 109 S.Ct. at 2722-23.

Absent allegations that the Board had a policy of racial discrimination in the implementation of discipline, count two of the complaint fails to state a claim and should be DISMISSED.

IV. CONCLUSION

Not every tort can be remedied under federal law. Plaintiff, in both her § 1983 and Title IX claims, seeks to hold the school Bard and the elementary principal responsible for the actions of a third party where neither plaintiff nor the third party is under the school's custody. The Due Process Clause does not "transform every tort committed by a state actor into a constitutional violation." DeShaney, 489 U.S. at 202, 109 S.Ct. at 1006 (quotations omitted).

Defendants' motion to dismiss the complaint in its entirety is GRANTED. The complaint is DISMISSED without prejudice.

SO ORDERED, this 29th day of August, 1994.

APPENDIX D

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 94-9121

AURELIA DAVIS,
as Next Friend of LaShonda D.,
Plaintiff-Appellant,

v.

MONROE COUNTY BOARD OF EDUCATION, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia
(No. 94-CV-140-4 MAC (WDO))
Wilbur D. Owens, Jr., Judge

Aug. 1, 1996

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BANC

Before TJOFLAT, Chief Judge, and KRAVITCH, HATCHETT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, Circuit Judges.*

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* Senior U.S. Circuit Judge Albert J. Henderson has elected to participate in further proceedings in this matter pursuant to 28 U.S.C. § 46(c).

BY THE COURT:

A member of this court in active service having requested a poll on the suggestion of rehearing en banc and a majority of the judges in this court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above cause shall be reheard by this court en banc. The previous panel's opinion is hereby VACATED.

APPENDIX E

[Filed May 4, 1994]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION

Civil Action File No. 94-140-4-MAC

AURELIA DAVIS,
a/n/f of LaShonda D.,

Plaintiff

vs.

MONROE COUNTY BOARD OF EDUCATION; CHARLES DUMAS, SUPERINTENDENT OF THE MONROE COUNTY BOARD OF EDUCATION; and BILL QUERRY, PRINCIPAL OF HUBBARD ELEMENTARY SCHOOL, all individually and in their official capacities,

Defendants

JURY TRIAL REQUESTED

Introduction

1.

Plaintiff is a citizen of Monroe County, Georgia and mother of her minor child LaShonda D., and files this action against Monroe County, the Monroe County Board of Education, Charles Dumas, Superintendent of the Monroe County Board of Education, individually and in his official capacity, and Bill Querry, Principal of Hubbard Elementary School, individually and in his official capacity for injunctive relief and compensatory damages.

2.

Plaintiff's child was subjected to sexual and racial discrimination under color of state law and in utter disregard for the rights guaranteed her under Title IX of the Education Amendments of 1972, and Title VII of the Civil Rights Act of 1964.

Jurisdiction

3.

This claim concerns the violation of civil rights and this court has jurisdiction pursuant to 28 U.S.C. § 1331 and 1343(3).

Venue

4.

Plaintiff and Defendants currently reside in Monroe County, Georgia, which is in this District and Division; the Plaintiff was a resident of Monroe County at the time the claims arose; the claims alleged arose in the Middle District. Accordingly, venue properly lies pursuant to 28 U.S.C. § 1391.

Parties

5.

Plaintiff AURELIA DAVIS sues in her capacity as next friend of her minor daughter LaShonda. She is a resident of 491 Stroud Street, Forsyth, Monroe County, Georgia.

6.

Defendants:

(1) MONROE COUNTY BOARD OF EDUCATION is responsible for formulating policies for the administration of all Monroe County public schools, including Hubbard Elementary School, and for the training and supervision of its employees in accordance with the authority granted in the Ga. Const. Art. VII, § 5, paras. 1 and 2,

and O.C.G.A. § 20-2-50. The Monroe County Board of Education may be served at P.O. Box 1308, Forsyth, Georgia 31029.

(2) Defendant CHARLES DUMAS is the superintendent of the Monroe County Board of Education. He is, and was at the time of the incidents complained of, responsible for overseeing the daily administration of the schools and carrying out the policies established by the Board of Education. Mr. Dumas may be served through the Monroe County Board of Education, P.O. Box 1308, Forsyth, Georgia 31029.

(3) Defendant BILL QUERRY is the principal of Hubbard Elementary School and is charged with carrying out the policies of the Board of Education within his school. He is also responsible for overseeing the discipline of the students of Hubbard Elementary School. Mr. Querry may be served at the Monroe County Board of Education, P.O. Box 1308, Forsyth, Georgia 31029.

All individual defendants are individually and severally responsible for the acts of sexual and racial discrimination.

By virtue of this Complaint and otherwise, all Defendants and their counsel are on notice of the claims against them and asked to identify and investigate such claims. All individual Defendants are sued in their official and individual capacities.

Factual Allegations

7.

On or about December 17, 1992, Platintiff's minor daughter LaShonda, began to be harassed by a fellow fifth-grade student and classmate, G.F., while at school. This harassment has consisted of repeated attempts by G.F. to touch her breasts and vaginal area, and vulgar language by G.F. directed to LaShonda. G.F. has said such things to LaShonda as "I want to get in bed with you" and "I want to feel your boobs." Incidents such as this oc-

curred also on or about January 2, 1993, and on or about January 20, 1993. After each of these incidents LaShonda notified the classroom teacher, Mrs. Diane Fort. She also told her mother, who then called Mrs. Fort and was assured that the principal, Mr. Querry had been notified of this incident.

8.

On or about February 3, 1993, while in her P.E. class, G.F. placed a door stop in his pants and behaved in a sexually suggestive manner toward LaShonda. LaShonda reported this incident to the P.E. teacher, Coach Maples.

9.

These incidents of harassment also occurred while LaShonda and G.F. were under the supervision of other teachers. On or about February 10, 1993, G.F. harassed LaShonda in Mrs. Joyce Pippin's class. LaShonda again notified the teacher and Mrs. Davis called the teacher to follow up on her daughter's complaint.

10.

On or about March 1, 1993, G.F. again harassed LaShonda in Coach Whit Maples' P.E. class. LaShonda notified both the Coach and Mrs. Joyce Pippin. LaShonda and other girls who had been harassed by G.F. wanted to go as a group to Mr. Bill Querry, the principal, but were told by their teacher "If he wants you, he'll call you."

11.

On or about April 12, 1993, G.F. rubbed his body against LaShonda's in what she felt was a sexually suggestive way in the hall on the way to lunch. LaShonda called this to Mrs. Diane Fort, her teacher's attention.

12.

On or about May 19, 1993, approximately five months after the first incidents of harassment occurred, LaShonda,

after more of the same inappropriate behavior by G.F., came home and told her mother, the Plaintiff, that she "didn't know how much longer she could keep him off her." Mrs. Davis spoke to the principal of the school on or about May 19, 1993 to see what action would be taken and was told, "I guess I'll have to threaten him (G.F.) a little bit harder." During this conversation, Mr. Querry asked LaShonda "why she was the only one complaining."

13.

At all times during these incidents LaShonda's assigned seat in Mrs. Diane Fort's class was next to G.F.'s. LaShonda asked several times to be moved to a different seat to remove herself from contact with G.F., but she was not allowed to change seats until complaining for over three months.

14.

As a result of G.F.'s conduct on May 19, 1993 brought about by the school's failure to act, G.F. was charged with and pled guilty to sexual battery.

15.

This constant harassment has been detrimental to LaShonda's mental health. LaShonda's ability to concentrate on her school work has been affected by her constant efforts to fend off G.F.'s advances. LaShonda's grades, previously all A's and B's, dropped as a result of this harassment by G.F. In April of 1993, in the midst of these occurrences of harassment, LaShonda's father found a suicide note that LaShonda had written.

16.

In addition to harassing LaShonda, G.F. behaved in a similar maner toward other girls in the class. At no time during this period of constant harassment was G.F. suspended, kept away from LaShonda, or disciplined in any way even after repeated complaints by LaShonda and her

mother. However, G.F. was suspended for slapping another child, who was white.

17.

The Monroe County School Board, at the time of these incidents, had no policy to guide its employees and had given its employees no training in responding to an occurrence of sexual haassment of a student. Neither the Teacher's Handbook, nor the Board Policy Manual provide a plan of action or any guidance in handling instances of sexual harassment of students, nor even addresses the problem of sexual harassment of students.

18.

The Monroe County Board of Education, in their failure to have a policy concerning sexual harassment of students and in their failure to respond to the complaints of this student, was willfully and deliberately indifferent to the needs of this black female student. The Board of Education knew or should have known that the failure to implement a policy providing guidance for teachers and other employees in responding to sexual harassment claims by students would result in a violation of students' clearly established right to be free from sexual and racial discrimination.

19.

Defendant Querry was responsible for supervising discipline of the students in his school and for determining whether students should be suspended. He knew or should have known that Plaintiff's daughter would be harmed by his failure to intervene and prevent sexual harassment of LaShonda by G.F.

20.

Defendant Bill Querry's refusal to act against G.F. demonstrated his callous disregard for the rights of this black female student.

Relief Sought

Statutory Violations

COUNT I

Sex Discrimination Pursuant to Title IX of the Education Amendments of 1972 codified at 20 U.S.C. § 1681, *et seq.* (1982).

21.

Plaintiff realleges paragraphs 1 through 20 above.

22.

Defendant Monroe County Board of Education, at all times relevant to this action, has been and remains a local education agency (LEA) as defined by § 1000(f) of the Elementary and Secondary Act of 1965 (codified at 20 U.S.C. § 3381), and the regulations contained at 34 C.F.R. § 106.2(j) (1988).

23.

Defendant Monroe County Board of Education is the recipient of federal financial assistance as the terms "recipient" and "federal financial assistance" have been defined in the regulations contained at 34 C.F.R. § 106.2 (g) and (h) (1988).

24.

Defendant Monroe County Board of Education is subject to the prohibitions of the Education Amendments of 1972, as codified at 20 U.S.C. § 1681, and has, upon information and belief, provided satisfactory assurance of compliance with the anti-discrimination provisions of the Education Amendments of 1972 to Assistant Secretary of Civil Rights of the United States Department of Education.

25.

Hubbard Elementary School is an elementary school within the administrative control and direction of Defend-

ant Monroe County Board of Education, Defendant Charles Dumas, and Defendant Bill Querry, and all operations of said Hubbard Elementary School are part of the education program and activity contemplated within the meaning of 20 U.S.C. § 1681 by virtue of § 3(a) of the Civil Rights Registration Act of 1987 (codified at 20 U.S.C. § 1687).

26.

The Monroe County Board of Education is not immune under the Eleventh Amendment of the Constitution of the United States from a suit in the Federal Court for violation of Title IX of the Education Amendments of 1972, Chapter 39, 886 Stat. 235 (1972), (codified at 20 U.S.C. § 1681, et seq. (1982), since the acts complained of herein occurred subsequent to October 21, 1986.

27.

The persistent sexual advances and harassment by the student G.F. upon Plaintiff interfered with her ability to attend school and perform her studies and activities. Had Defendant Bill Querry intervened as was necessary, the injury to LaShonda would have been mitigated and the situation would have been ended.

28.

The deliberate indifference by Defendants to the unwelcome sexual advances of a student upon LaShonda created an intimidating, hostile, offensive and abuse school environment in violation of Title IX of the Education Amendments of 1972, Chapter 39, 886 Stat. 235 (1972), (codified at 20 U.S.C. § 1681, et seq. (1982).

29.

The Defendants' indifference to the needs of female students and the needs of LaShonda specifically was deliberate and done under color of state law. Defendants' failure to take action resulted in extreme emotional damage

to LaShonda. This conduct gives rise to claims under the aforementioned statutes as well as pursuant to 42 U.S.C. § 1983 for injunctive relief and for money damages in the amount of $500,000.00 as a direct result of deliberate indifference and intentional discrimination against LaShonda by employees of the Defendant Monroe County Board of Education.

COUNT II

Discrimination based on Race.

30.

Plaintiff realleges paragraphs 1 through 29 above.

31.

Defendant Bill Querry's, an employee of Defendant Monroe County Board of Education, actions against G.F. to suspend him after striking a white student and his decision not to act when the same student G.F. assaulted a black student evidences willful and intentional racial discrimination on the part of the Monroe County Board of Education in violation of both the Education Act of 1972 and the Civil Rights Act of 1991.

32.

Plaintiff should have and recover compensatory, general, and punitive damages from Defendants Monroe County Board of Education, Charles Dumas and Bill Querry, for their willful and intentional violation of the civil rights of LaShonda based on her race in the amount of money damages for $500,000.00 and for her request of injunctive relief that no further female black students be treated accordingly.

WHEREFORE, Plaintiff prays the Court as follows:

(a) to take jurisdiction of this matter;

(b) grant a trial by jury;

(c) award Plaintiff actual compensatory damages in the amount of $1,000,000.00 against all Defendants and award punitive damages against the individual Defendants under each claim stated above in such amounts as the jury determines to be just;

(d) reasonable attorney's fees pursuant to 42 U.S.C. § 1988;

(e) order the Monroe County Board of Education to institute a policy providing guidance for employees in the event of sexual harassment of students by fellow students;

(f) enjoin the Monroe County Board of Education from discriminating against female students by failing to respond to complaints of sexual harassment;

(g) enjoin the Monroe County Board of Education from discriminating against black female students by failing to respond to complaints of sexual harassment for physical assault by fellow students.

RESPECTFULLY SUBMITTED, this 4th day of May, 1994.

/s/ Debra G. Gomez
DEBRA G. GOMEZ
Georgia State Bar No. 300509

/s/ Mary P. Sullivan
MARY P. SULLIVAN
Georgia State Bar No. 691427